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IN THE

Supreme Court of the United States

No. 77-1592

BOBBY C. CAMBRON, et al, APPELLANT

V.

CANAL INSURANCE CO., APPELLEE

APPEAL FROM THE SUPREME COURT of GEORGIA

APPENDIX TO

STATEMENT AS TO JURISDICTION

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ORDER - THE SUPREME COURT OF GEORGIA

33008 CANAL INSURANCE COMPANY V. CAMBRON ET AL

33009 CAMBRON ET AL V. CANAL INSURANCE COMPANY

HALL, Justice.

Canal Insurance Company filed a suit in equity in Polk Superior Court seeking to set aside certain judgments against its former insured, Glover. This appeal is brought by Canal from adverse judgments which dismissed its complaint as to each defendant; granted each defendant summary judgment; denied Canal's motion for summary judgment; and dismissed Canal's complaint against Evelyn Hilton for additional jurisdictional reasons. There is a cross-appeal.

Canal's insured was Glover, a taxi driver who was sued by his passengers, Mr. and Mrs. Hilton, following a serious automobile collision. Mr. Hilton later died of his injuries as did Glover. (For convenience, the suit instituted in his name will be referred to as Mr. Hilton's suit). Canal began defense of the Hilton's suits against Glover, but later decided the relevant policy had been cancelled by Canal prior to the collision. Canal withdrew from the defense, and one Cambron, the deputy clerk of Polk County Superior Court, was appointed Glover's administrator on the day of trial.

Marson G. Dunaway, Jr., an attorney, represented Cambron as Administrator of Glover's estate, and he was also counsel of record for the Hiltons in their suit against Glover. Cambron adopted the defensive pleadings filed by Canal and announced ready for trial; but when the case was called for trial he did not appear himself or through counsel, and the Hiltons took default judgments. After hearing a minimal amount of evidence concerning damages, which was insufficient to prove the amounts sued for, namely $250,000.00 for Mr. Hilton and $100,000 for Mrs. Hilton, the court directed the jury to enter verdicts for the Hiltons in the amounts sued for, and this was done.

Cambron then sued Canal to recover under the policy. Canal removed the suit to federal court, and in Polk Superior Court filed its own suit in equity under Code Ann. 81A-160 seeking to set aside the Hiltons' judgments against Glover. The federal court stayed its decision pending decision of Canal's suit. The Polk Superior Court ruled against Canal, granting on all grounds the defendants' motions to dismiss its suit in equity, and defendants' motions for summary judgment. There was a counterclaim brought by defendants Cambron, Dunaway and Evelyn Hilton against Canal, alleging abuse of process in claiming fraud without basis. The trial court denied the counterclaim and this judgment is the basis of the cross-appeal.

1. For clarity, some hotly contested initial matters must be decided. Contrary to defendants' (Cambron and the Hiltons) argument here, Canal has not brought a collateral attack on these judgments. A suit in equity is a direct attack under Code Ann. 81A-160(b). Lewis v. Lewis, 228 Ga. 703 (187 SE2d 872) (1972). Additionally, there is no requirement that to attack it Canal show the judgment to be void on its face. See, e.g., Henry & Co. v. Johnson, 173 Ga. 541 (173 SE 659) (1933). Voidness "on its face" under 81A-160(a) is said to allow any person to attack a judgment in any court; but it does not specify the only way an entity affected by a judgment may attack it. Canal has sought to proceed under Code Ann. 81A-160(e) with a complaint in equity to set the judgment aside "for fraud, accident or mistake, or the acts of the adverse party unmixed with the negligence or fraud of the complainant." Defendants contend that Canal may not bring such an attack because it was not a party to the judgment. This is an incorrect proposition.

Our statute is dissimilar to the federal rule allowing attacks on judgments (Rule 60, Fed.R.Civ.Proc.), and the noted treatises thereon, usually so helpful, are inapposite. But Georgia case law shows that relief in equity is not limited

to parties, nor even to their "privies" in the narrowest[1/] technical sense.

Since 1852, it has been the law of Georgia that when a court purports to render judgment beyond its jurisdiction, the judgment is void as to a third person, "and may be impeached whenever and wherever it is sought to be used as a valid judgment." The Central Bank of Georgia v. Gibson, 11 Ga. 453 (1852). It is clear that a third person not a party to a judgment may attack it for fraud, as Canal seeks to do. Lewis v. Lewis, 228 Ga. 703 (187 SE2d 872) (1972); Simpson v. Bradley, 189 Ga. 316, 318 (5 SE2d 893)(1939).

The Restatement of Judgments addresses the problem directly:

1/ "'The general rule as to the effect of judgments is, that they are conclusive upon parties and privies... Privies are all persons who are represented by the parties and claim under them, all who are in privity with the parties, the term privity denoting mutual or successive relationships to the same rights of property.'" Walka Mountain Camp, etc. v. Hartford Acc. & Ind. Co., 222 Ga. 249, 252 (149 SE2d 365)(1966).

"115 Persons Not Parties to a Judgment. (1) Any person whose interests have been adversely affected by a judgment, and only such a person, may be entitled to equitable relief.
***
"Comment f. on subsection1: A person who is subjected to liability by the rendition of a judgment, whether or not he is a party to it, is entitled to equitable relief against it if it was improperly obtained, in accordance with the rules stated in this Chapter. *** "Restatement, Judgments 115 (1942). (Emphasis added.)

There can be no doubt that Canal is an entity subjected to liability by the rendition of the judgment, within the meaning of the Restatement. This conclusion follows from prior holdings. For example, "In the absence of fraud and collusion, if an automobile insurer who has a right to defend actions against the insured has timely notice of such an action and elects not to defend, the judgment in such case is binding on the insurer as to issues which were litigated therein, when the insurer is later sued by the injured person." Public National Ins. Co. v. Wheat, 100 Ga.App. 695, 701 (112 SE2d 194) (1959).

Therefore, the fact that Canal was not a party to the judgments it seeks to attack does not prevent its bringing this action.

2. The attack is brought on the ground of fraud, among others, and defendants assert that the complaint is subject to dismissal because the allegations of fraud are not adequately particularized. The defendants' position overlooks Bryant v. Bryant, 236 Ga. 265 (223 SE2d 662)(1976) holding that fraud does not have to be pleaded with particularity to withstand a motion to dismiss. The proper remedy is by motion for a more definite statement under Code Ann. 81A-112(e). The allegations of fraud in the complaint are adequate to state a claim.

What has been written is sufficient to show that Canal is entitled to its day in court seeking to prove the allegations of its complaint. Defendants in their motion for summary judgment failed to show that they were entitled to judgment as a matter of law and that there were no material fact issues remaining for decision. Code Ann. 81A-156 (c). If Canal succeeds below, the entire judgments including liability and damages may fall. But Canal may not succeed on its fraud theory, requiring that we consider its independent attack on the damages portion of the Polk County judgments.

3. Canal attacks the award of damages totalling $350,000 on the ground

that the trial judge's directing the jury to return verdicts in that amount exceeded the power of the court because the amount of damages is for the jury to determine. Again, Canal need not show that the alleged unauthorized act is visible "on the face of the record" subjecting it to collateral attack, in order to attack the judgment. This is a direct attack brought under Code Ann. 81A-160(e). Although the language of that section mentions only the following situations, "Complaint in equity may be brought to set aside a judgment for fraud, accident or mistake, or the acts of the adverse party unmixed with the negligence or fault of the complainant," equity has the power to afford relief on more grounds than those mentioned. In Kitchens v. Clay, 224 Ga. 325, 327 (161 SE2d 828)9L968) we ruled that subsection (e) embodied the principles of former Ga. Code Ann. 37-219 and 110-710, repealed by the CPA, and cases under those sections applied under subsection (e). The principles of Code Ann. 110-709, which was not repealed by the CPA, apply to subsection (e). See Wasden v. Rusco Industries, Inc., 233 Ga. 439, 445 (211 SE2d 733)(1975). Code Ann. 110-709 reads as follows:

> "The judgment of a court having [sic] jurisdiction of the person or subject-matter, or void for any other cause,

is a mere nullity, and may be so held in any court when it becomes material to the interest of the parties to consider it." (Emphasis added.)

(The statute is obviously misprinted, and means to refer to a court not having jurisdiction, etc.) This court wrote 25 years ago that a judgment void on jurisdictional grounds could be attacked by third parties:

"A lack of jurisdiction or power in a court entering a judgment always voids the judgment, and this is especially true as it relates to and affects the rights of other parties; such action is a mere usurpation of power by the court and may be declared void collaterally without any direct proceedings to revise it. Prescott v. Bennett, 50 Ga. 267. And since the court rendering the judgment here involved had no jurisdiction or power to give it any retroactive effect, its action in attempting to do so was a nullity; and such action, being therefore void, is subject to collateral attack by anyone whose rights are affected thereby, whenever and wherever asserted. Code 110-709; Western Union Telegraph Co. V. Taylor, 84 Ga. 408 (11 S.E. 396, 8

L.R.A. 189); Deck v. Shields, 195 Ga. 697 (25 S.E. 2d 514); 31 AmJur 184, 583." Royal Indemnity Co. v. Mayor, etc., Savannah, 209 Ga. 383, 391 (73 SE2d 205)(1952). Accord, First Fidelity Ins. Corp. v. Busbia, 128 Ga. App. 485, 486 (197 SE2d 396) (1973).

We construe Code Ann 110-709 to give a remedy under Code Ann 81A-160(e) to third parties who attack a judgment as void for any cause. Accord, Restatement, Judgments 117 and Comment c(1942). Anything to the contrary in Thomas v. Lambert, 187 Ga. 616 (1 SE2d 584)(1939) is overruled.

It follows that Canal may bring the attack. We must now ask whether the attack has merit; that is, whether the judgments are "void" albeit not void on the face of the record.

The right to a jury verdict on the issue of damages in an ex delicto action is embedded in the constitution. Code 2-3307, (formerly, Constitution, 1945 2-3907). Code Ann. 81A-155(a) states: "The plaintiff shall be required to introduce evidence and establish the amount of damages . . . before a jury as to actions ex delicto." That was not done in the Hiltons' suits; instead, the trial court instructed the jury to return the damage amounts awarded. The resulting

judgments are void because they surpass the jurisdiction of the court. "The trial court was without jurisdiction to render the judgment without the verdict of a jury, the action being for unliquidated damages, and such judgment was void." Green v. Green, 76 Ga. App. 225, 228-229 (45 SE 713)(1947); cf. First Fidelity Ins. Corp. v. Busbia, 128 Ga. App. 485 (197 SE2d 396)(1973). The direction of the jury verdict was equivalent to the trial court's dispensing with the jury altogether, Georgia Farm Bureau Mut. Ins. Co. v. Williamson, 124 Ga. App. 549, 551 (184 SE2d 665)(1971), which is reversible error in an ex delicto action.

Defendants argue that the State Court of Polk County was empowered by the Act creating it to act without a jury absent a demand for a jury trial (which was not made). 1901 Ga. L. 156 at 159. Defendants cite numerous old decisions. However, "where a provision of a special Act establishing a court of record conflicts with a provision of the Civil Practice Act, the latter controls. [Citations]." Pittman v. McKinney, 135 Ga. App. 192 (217 SE2d 446)(1975). See also Morer v. C. & S. Bank of Milledgeville, 239 Ga. 342 (236 SE2d 590)(1977). The local act's provision that a jury is waived if not demanded in ex delicto actions conflicts with the CPA which requires a jury, and must therefore yield.

Pittman v. McKinney, supra. Construing Code Ann. 81A-155, since that section contemplates a foregoing default judgment, it is incorrect to interpolate, as defendants ask, a requirement that the non-appearing defendant must have spoken up to demand a jury to determine the amount of damages, to avoid waiver.

It follows that the unauthorized act of the State Court of Polk County in directing the jury to enter certain damage verdicts renders the judgments entered thereon void.

4. We come now to the contention that the federal court's action is res judicata on certain issues in this litigation. It is not necessary for us to construe the full scope of the federal court's orders including that staying its action pending the outcome of Canal's Polk County attacks on the judgments, of which the instant appeal is a part. It is plain from our reading of the orders that no issues discussed herein may reasonably be said to be res judicata.

5. What has been written allows Canal to proceed with its attack in equity on the judgments, and invalidates the damage amounts awarded by directed verdict. It therefore becomes unnecessary for us to consider Canal's additional argument that F. L. Hagen, Administrator of Wesley Hilton's estate, was never prop-

erly made a party.

6. Mrs. Evelyn Hilton moved the trial court to dismiss the complaint as to her on the double ground that she was, at and since the time of the filing of the complaint, a resident of the State of South Carolina and was not properly served there, and she was served after the statute of limitations on Canal's cause of action had run, meaning that Canal had failed to state a claim against her.

Under Code Ann. 81A-104(e)(2) Mrs. Hilton was subject to personal service outside Georgia in this action which is in the nature of an in rem[1/] action affecting property rights flowing from a

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1/ Our conclusion that an action to set aside a judgment is an action in rem or quasi in rem follows from the nature of a judgment as property within the state. A right to recover at law is a chose in action. Code 85-1802. A dormant judgment is a chose in action. Armstrong v. Harper, 25 Ga. App. 71 (1920). A chose in action is personalty. Code 85-1801. ". . . where the subject of the suit relates to an actionable interest or claim by the plaintiff in real or personal property located in this state, a court of equity in this state will have jurisdiction to render a decree in

judgment. The return of service shows she was personally served by the deputy sheriff of Anderson County, South Carolina, and the service does not appear improper for any reason asserted.

Under 81A-160(f) there was a three-year limitation period on Canal's bringing a suit in equity to attack the judgments. Suit was filed January 6, 1977,

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1/ (Cont'd) rem with respect to the particular property involved, so as to exclude the adverse interest of a non-resident who has been made a party . . and . . . served by publication . . ." Blount v. Metropolitan Life Ins. Co., 190 Ga. 301, 303 (9 SE2d 65)(1939).

Our analysis appears to accord with the majority view in the United States: "Most courts regard such judgment as a res within the state, and the proceeding to set it aside as a proceeding in rem, and uphold the judgment setting aside or vacating the previous judgment, although no personal service within the state is made upon the defendant and although the service upon him was by publication or personally beyond the jurisdiction of the court." Annot., Process, Action to Set Aside Judgment, 163 ALR 504, 505 (1946).

On our facts, of course, Mrs. Hilton was personally served outside the state.

one day before the statute ran, but service on Mrs. Hilton was not perfect until July 19, 1977. Canal contends that its diligence during the interim period in attempting to locate Mrs. Hilton, who had moved to South Carolina but apparently maintained no fixed address, should enable service to relate back to the time of filing the complaint, under Cox v. Strickland, 120 Ga. 104, 114 (47 SE 912)(1904); Hutchins v. Hunter, 135 Ga. App. 40 (217 SE2d 375)(1975) and similar authority.

Mrs. Hilton had been represented by Marson Dunaway since the initiation of the Polk State Court suits, and continues to be represented by him now. Dunaway was himself made a defendant in Canal's action and had timely notice of the suit. He refused Canal's request that he accept service for Mrs. Hilton. He was asked by interrogatory and by personal contact to provide an address from Mrs. Hilton so that she might be served, and either he could not or he would not do so. Finally his secretary (perhaps on his instruction) provided an address and service was perfected soon thereafter on Mrs. Hilton, who was residing at the home of a third party. These facts show adequate diligence on Canal's part in attempting to make service, and we see nothing indicating that Mrs. Hilton has

been prejudiced in any way by the delay. Service on her relates back to the filing of the complaint so that Canal's action is not barred as to Mrs. Hilton. The superior court erred in dismissing the complaint as to her.

7. Considering the counterclaims which are the subject of the cross-appeal, the trial court did not err in granting Canal's motion to dismiss them. Simpson v. Jones, 182 Ga. 544, 546 (186 SE2d 558)(1936)(litigation must first be terminated); Monumental Properties, Inc. v. Johnson, 136 Ga. App. 39, 41 (220 SE2d 55)(1975)(same); Terry v. Wonder Seal Co., 120 Ga. App. 423 (170 SE2d 745)(1969)(not recoverable by counterclaim in trial of same action).

The judgments attacked in the main appeal are reversed; the cross-appeal is affirmed. All the Justices concur.

CAPTION

MOTION FOR REHEARING

NOW come appellees, Bobby C. Cambron and Evelyn Hilton, and pursuant to Rules 19 and 33 of the Supreme Court of Georgia, file this Motion for Rehearing. In support of this Motion the Appellant shows:

-1-

On the 19th day of January, 1978, in an opinion written by Justice Hall, the Supreme Court of Georgia reversed the granting of a Summary Judgment in favor of appellees, and apparently reversed the denial of a Summary Judgment denied to appellant by the trial court.

-2-

Appellees show that the following additions or corrections in statements of fact contained in the court's opinion should be made so that the opinion will be in conformity with the record:

A. At page 2, line 5 the words following in parentheses should be added to to the statement of fact: "Marson G. Dunaway, Jr., an attorney, represented Cambron (in securing his appointment) as Administrator of Glover's estate, and he was also counsel of record for the Hiltons in their suit against Glover."

B. At page 2, lines 10-12, the words in parentheses in the following quotation should be deleted for the reason that there was no issue made in this case as

to the sufficiency of the evidence before the trial court in the trials under attack, and in fact there is no legal transcript of the evidence in the record before this court, but only a purported "transcript" filed more than 9 months after the final judgments in the cases: "After hearing a minimal amount of evidence concerning damages (which was insufficient to prove the amounts sued for) the court directed the jury to enter verdicts for the Hiltons in the amounts sued for, and this was done."

C. At page 2, lines 19-21, the opinion recited: "The federal court stayed its decision pending decision of Canal's suit (in Polk Superior Court, the present action)."

Appellees submit that the court, in order to correctly set out the situation should add thereto the following: "Canal, in the federal court actions had denied that they had coverage to protect Glover and Cambron, claimed fraud and collusion, and claimed that the judgments in favor of the Hiltons were void. The federal court entered Summary Judgment for plaintiff Cambron in which it adjudicated all issues except the question of fraud, but stayed the judgments pending a determination of theissue of fraud

involved in the State court action (the present action)."

D. At page 3, line 19, the opinion recites "Defendants contend that Canal may not bring such an attack (referring to fraud) because it was not a party to the judgment. This is an incorrect proposition."

Appellees submit that the court has misconstrued, and in the opinion misstated the position taken by these appellees with reference to this appeal.

These appellees contend that Canal may not bring this action to set aside the judgments for fraud for the following reasons, to wit:

1. As held by the trial judge, Canal undertook to defend the actions brought against Cambron's intestate (Glover) and filed defensive pleadings through its (Canal's) attorneys. Canal was in complete control of the litigation and was bound by its contract to continue to defend the cases. (As held by Judge Henderson in the federal court case on at least 4 grounds). Canal made an erroneous determination and decision that it had cancelled its policy and instructed its attorneys to withdraw from the de fense of the cases, which they did.

Canal was fully informed and notified that an administrator would be appointed for Glover's estate, and that he would likely acknowledge service, adopt the defensive pleadings filed by Canal's attorneys, and that the cases would be called and tried on January 7, 1974. Canal did nothing and the cases were called and tried. The record in the cases shows a verdict in the usual form and a judgment entered on the verdict. No motions or appeals from either verdict were pursued by Canal.

These appellees contend that this set of circumstances which is shown by the pleadings before the trial court, and the evidence before the trial court on motion for summary judgment justly and equitably require the holding made by the trial court that "equity will grant no relief to one against whom an unfavorable judgment has been rendered, even in consequence of fraud, where the aggrieved party could have prevented the return of such a judgment by the exercise of proper diligence" This quotation is from the 3rd division of the opinion of this court in LEWIS V. LEWIS, 228 GA 703 which decision is cited by this court in this case for the proposition that a court

of equity may set aside a judgment obtained by fraud.

In its decision of January 19th, this court overlooked the lack of diligence and even the wilful failure of Canal in withdrawing from the defense of the suits and failing to protect both itself and its insured's estate and administrator from any succeeding errors that may have occurred on the trial of the cases; and this court overlooked that portion of the decision in

LEWIS VS. LEWIS, 228 GA 703

which is consistent with the trial court's granting of summary judgment and inconsistent with this court's reversal.

2. Since the judgments attacked by Canal were not void on their face, or on the face of the record, and since Canal was not a party to the suits, it could not make the present attack on the judgments because: 1- An attack by a stranger to the record in a court other than the court of rendition constitutes a collateral attack, in spite of the provisions of CPA which state that a suit in equity is a "method" whereby a judgment may be attacked "directly". This doesn't mean, we submit, that every attack made by

suit in equity is a "direct" attack. This court we respectfully urge, has misconstrued and misapplied

LEWIS V. LEWIS, 228 GA 703 which stated "For sufficient cause, and with proper parties; a court of equity has jurisdiction....to set aside judgments (in other courts)....and such a proceeding is a direct and not a collateral attack." We submit that the "sufficient cause" and "proper parties" as set out in this cited case are a far cry from the cause and the parties involved in the present case.

and SIMPSON V. BRADLEY, 189 GA. 316

which was a case, shown by that decision @ 317 "Where the absence of jurisdiction appeared from facts on the face of the record."

In this respect, we further submit that the court overlooked, in overruling

THOMAS V. LAMBERT, 187 GA 616

the long line of cases in which this court has rightfully followed the principle set out in the second head-note of that opinion, and particularly

ROWELL V. ROWELL, 214 GA 377 @ 379

where this court said "In rendering its judgment of March 30, 1956, the court

had jurisdiction of the parties and the subject matter. The judgment is regular on its face, and the presumption is that there was sufficient evidence to authorize the judgment and it is conclusive as to the subject matter which it purports to decide until it is reversed or impeached for fraud. It cannot be collaterally attacked on account of any error or want of regularity in its exercise. An irregular judgment is one that is entered contrary to the manner of practice and procedure allowed by law in some material respect. Where jurisdiction is once attached, mere errors or irregularities in the proceedings, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void."

E. At page 12, line 7, in discussing Canal's actions in attempting to secure timely service on Evelyn Hilton, the court said that Mrs. Hilton's counsel was asked by interrogatory and by personal contact to provide an address from Mrs. Hilton so that she might be served, and "either he could not or he would not do

so. Finally, his secretary....provided an address... These facts show adequate diligence on Canal's part...."

This court overlooked the fact in the record that counsel for Mrs. Hilton in March of 1977 furnished Canal the name of the State and City where Mrs. Hilton lived, according to his best information, and that he did not at that time know what her street address was. It was over four months later that Canal made any substantial effort to locate Mrs. Hilton, and this court should, we believe, set out the evidence that the trial court had before it in exercising its discretion and finding that Canal had <u>not under the actual facts shown by the record</u> exercised adequate diligence in attempting to make service; and when this is done and realized, we submit that this court will sustain the trial judge's decision in dismissing the action as to Mrs. Hilton because the same was not brought within the period of the statute of limitations. Mrs. Hilton has surely been prejudiced by this court's failure to extend the benefit of the Statute of Limitations to her, as the trial court did.

-3-

This court's judgment of reversal of the trial court's granting summary judgments to appellees is, we submit, shown to be error under the record in this case by the quoted portion of the case of

PUBLIC NATIONAL INS. CO. V. WHEAT, 100 GA APP 695

at page 5 of the opinion. That case is said, approvingly by this court, to hold that if an automobile insurer has timely notice of actions against the insured, and elects not to defend, the judgment in such case is binding on the insurer as to issues which were litigated therein "in the absence of fraud and collusion."

How can this court ignore the logic of the trial court's imposing the sanction of the above case against Canal, unless the record (which should be before this court in its entirety) shows that there was left an issue of fact as to fraud?

-4-

In this appeal from the granting of summary judgments against appellant, these appellees filed a motion in this court to require the forwarding by the

trial court clerk of the depositions tendered in evidence in support of the motion for summary judgment and the affidavits tendered and considered by the trial court in making its ruling in favor of the motions to dismiss and for summary judgment on each and every ground. Appellant, whose duty and responsibility it was to positively show error by the trial court, opposed that motion to provide this court with all the evidence (which incidentally was the only evidence tendered to the court). At that point these appellees dismissed their motion in the belief that this court would surely refuse to consider this appeal because the appellant had failed to even show what evidence the trial court had weighed in making its judgment, much less to show that such evidence was insufficient to support the granting of the summary judgments.

We submit that this court has overlooked the principle of law set out in the case cited @ p. 21 of our original brief:

BARRINGER V. PORTER, 211 GA. 20

that the burden is on the appellant to show by the record that the trial court

erred. How can this court know whether there is an issue of fact as to fraud that should be submitted to a jury or not, if it has not seen and studied the evidence that moved and motivated the trial judge in holding that there was not such an issue? As a matter of fact, if this court will secure the deposition of Canal's claims manager, it will find that counsel for Canal during cross examination of its claims manager, it will find that counsel for Canal during cross examination of its claims manager, withdrew any claim that fraud was involved or charged.

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The Court's judgment and opinion of January 19th, we submit, which positively voided the damage amounts awarded in the judgments sought to be set aside by Canal, was unquestionably erroneous in that these appellees were and are entitled to procedural due process of law and are further entitled not to have their property taken from them without equal protection of the laws. These rights are rights they have and should enjoy as citizens of the United States, under the

Fifth Amendment and Fourteenth Amendment to the U.S. Constitution. This court's decision ignores the facts shown by the record before it that appellant did not follow procedures set out by Georgia Law to secure a ruling by this court, or the trial court, on its motion for summary judgment. Canal's motion was filed with the court after argument of the motions for summary judgment filed by appellees; it was not served on appellees for the period required by law before it could have been heard by the court; the court issued no order setting it for a hearing and no evidence in support of the motion was served therewith; no hearing was ever held thereon. This, we submit, was sufficient reason for the trial court to overrule appellant's motion for summary judgment and was reason requiring the overruling thereof.

We further submit that under our statutes the overruling of a motion for summary judgment is not an appealable judgment and that this court, without having benefit of the full record of evidence

in the trial court is not authorized to weigh and decide the issue as to whether the amounts of the damages in the judgments attacked by Canal are void; but, at most, should remand the issue to the trial court so that these appellees will have an opportunity to question Canal's evidence and submit their own evidence in support of their contentions that the judgments are not void.

-6-

This Court, we submit, in reversing the trial court's dismissal of the fraud and collusion count of the complaint and granting appellees' motion for summary judgment thereon, ignored the fact that even prior to the CPA requirement for the pleading of fraud with particularlity (Ga. Code Ann. 81A-109(b)) our decisions under Code Ann. Sect. 110-709 required that the acts claimed to constitute fraud had to be clearly and specifically alleged. See

COLEMAN VS. COLEMAN, 113 GA 149

"In order to authorize a court of equity to entertain a petition to set

aside a judgment for fraud, the acts claimed to constitute fraud must be clearly and specifically alleged; and mere general averments that the judgment was obtained by misrepresentations, concealment, and fraud are not sufficient."

This court continued @ 151 as follows: "A court of equity will never entertain an application to set aside a judgment upon mere loose and general averments of fraud."

While in the present case @ p. 7 of the opinion, this court says, "The principles of Code Ann. Sect. 110-709, which was not repealed by the CPA, apply to subsection (e), this court invokes none of the principles established under that code section that favor appellees; but only those principles which support appellant.

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That portion of this court's decision of January 19, 1978, which voids the amounts of the judgments obtained by these appellees on the ground that the State Court of Polk County exceeded its jurisdiction in directing the verdicts does

not address or resolve the issue made by the appeal as to whether the purported "transcripts" filed in the office of Clerk over nine months after the rendition of the judgments are considered by this court as a part of the "record" in those cases. Although this court is silent as to even the raising of such issue, we submit that it is critical, and that if this Court is willing say that a litigant (or even a stranger who has become interested) in a law suit can make the report of evidence in a suit a part of the record by filing it nine months after the judgment in a case where no motion or appeal has been filed in the meantime, then the ruling herein made by the court would achieve some degree of consistency. We do not believe that this court will adhere to its original decision in this case when it considers in fairness to appellees that such decision depends on such a construction.

The basic fault in that portion of the court's voiding of the amounts of the judgments attacked by Canal lies, we believe, in that the court has overlooked that in the case of

PRESCOTT V. BENNETT, 50 GA 267

cited as authority, the court there had no jurisdiction over the subject matter of the proceeding and has further overlooked the distinction, we think clearly delineated between cases in which a third person or stranger to the judgment whose interests are affected thereby may attack judgments and when the attack must be made by a party to the judgment:

SUWANEE TURPENTINE CO. V. BAXTER, 109 GA 597 @ 602

"To render a judgment void there must be want of jurisdiction of the subject-matter or of the person, or an excess of jurisdiction, or the judgment must be fraudulent or fraudulent and collusive. For a want or an excess of jurisdiction the defendant in a judgment may have it

set aside, but this can not be done by one who is a stranger to the judgment. A creditor or a stranger, when their interests are affected by the judgment, may have it set aside for fraud or fraud and collusion."

This court has not overruled the decision in the above case; and we submit cannot distinguish the present case from it on the facts as to the attack on the amounts of the judgments. Canal is a stranger to the judgments, and under that case clearly cannot attack the judgments on the ground that the court exceeded its jurisdiction.

JONES V. JONES, 181 GA 747 @ 752

"The judgment of a court having no jurisdiction of the person or subject-matter, or void for any other cause, is a merely nullity, and may be so held in any court when it becomes material to the interest of the parties to consider it....The assailability of a judgment of a court of competent jurisdiction for irregularity is one thing --- of a judgment of a court not having

jurisdiction, is a very different thing. In the latter case, the judgment may be impeached whenever and wherever it is sought to be used as a valid judgment, no matter in what way it is proposed to be used."

Can there by any question but that the State Court of Polk County had jurisdiction over the subject matter of the Hilton's suits: Can there be any question but that it had jurisdiction over the parties? There is no doubt.

This court said in

GEORGIA RR & BANKING CO. VS. PENDLETON 87 GA 751

"If not in all cases whatsoever, certainly in any case admitting of doubt, the question of rendering a judgment by the superior court without a jury is one not involving jurisdiction, but the proper exercise of jurisdiction, and the improper decision of it is mere error and will not render the judgment void."

ROWELL V. ROWELL, 214 GA 377 @ 379

"An irregular judgment is one that is entered contrary to the manner of prac-

tice and procedure allowed by law in some material respect. Where jurisdiction is once attached, mere errors or irregularities in the proceedings, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void."

We submit that this court, in voiding the amounts of the judgments obtained by appellees, has deprived appellees of their property without substantive due process of law in that due process involves the treatment of all persons under the same circumstances in the same manner; and in this case unless this court grants a re-hearing and affirms the trial court's judgment on the basis of the foregoing authorities, these appellees are having different and inapplicable principles of law applied to them than are applied generally by this court. Appellees further contend that they are not being afforded equal protection of the foregoing principles of law as other

citizens have been and are being afforded. Such deprivation and treatment, we contend, is contrary to appellees' rights as citizens of the United States under the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States.

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In division 4 of this court's judgment of January 19, 1978, the court said: "It is plain from our reading of the orders that no issues discussed herein may reasonably be said to be res judicata (because of the federal court's actions which are a part of the record)."

We respectfully submit that the ruling of this court that the trial court was incorrect in its ruling on summary judgment on this ground is error and deprives these appellees of their rights to property as adjudicated and established by the judgment of the United States District Court, Northern District of Georgia, and thus is contrary to and a violation of the Fifth Amendment to the

Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States in that they are deprived of their property without due process of law and are deprived of equal protection of the laws; and that this court has no jurisdiction to hear and determine any issue in this case other than the issue of bad faith, fraud or collusion because all other issues concerning liability of Canal to these appellees were adjudicated by the U.S. District Court except those questions of fraud which were released by said District Court for trial in the present State Court action.

See in the record @ p. 3 of District Court's order of May 9, 1977 (after reciting the entry of judgments on motions of appellees), "Canal urges that this court must still decide whether the state court judgments were obtained through bad faith, fraud or collusion" and "That forum (Polk County Superior Court) may address the issues of both

intrinsic and extrinsic fraud and clearly has jurisdiction to set aside the judgments."

Wherefore, appellees show that all issues in this case examined by this court have already been the subject of the prior litigation between the parties in the federal court and all issues have been determined by that court other than fraud.

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This court, errs in division 3 of its opinion which holds that the judgments in the actions attacked by Canal are void because the State Court of Polk County was without jurisdiction to render the judgment without the verdict of a jury because the CPA provision (81A 155) requiring a jury trial is in conflict with the provision of the Act in GA. LAWS 1901, p. 156 providing for a bench trial in the absence of a demand for a jury and the CPA provision must prevail.

This court cites two cases in support

of this holding in this case.

PITTMAN V. McKINNEY, 135 GA. APP. 192 we submit is not applicable for the reason that in that case the court said: "Since the record here shows on its face that the default judgment on plaintiff's ex delicto claim was entered without damages having been proved before a jury, the judgment is void on its face..."

We submit that in the present case the record shows on its face the rendition of a jury verdict and a judgment thereon.

MARLER V. C & S BANK OF MILLEDGEVILLE 239 GA. 342 is the other case cited by this court as authority for this proposition.

The writer of the opinion in the present case, Justice Hall, wrote a dissenting opinion in the MARLER case in which he held @ 345, "I would affirm the judgment based upon the ruling by the Court of Appeals."

The Court of Appeals ruling said: MARLER V. CITIZENS & SOU. BANK OF

MILLEDGEVILLE, 139 GA. APP. 851 @ 853

"....as to the Civil Court of Fulton County having the same provisions as here under consideration that 'the appellants, having failed to file a demand for jury trial before appearance day, waived their right to a jury trial... Finally the passage of the Civil Practice Act now obtaining in all courts of record did not change this time honored rule of law. This is not one of those matters within the purview of CPA Sect. 15 (c)."

Justice Hall also pointed out in his dissenting opinion @ 344, "The majority opinion holds (1) that the 1964 Act relating to the State Court of Cobb County, which requires a written demand for trial by jury, is not on its face in conflict with the CPA, and (2) that even though the demand was not made within the time required by the 1964 Act, the CPA, in Code Ann. 81A-115(a) gives a party the right to make the demand at any time befor the entry of a pre-trial order. I

agree that the demand for trial statute is not in conflict with that portion of the CPA embodied in Code Ann. 81A-138 and 81A-139. However, I dissent to the application of Code Ann. 81A-115(c)."

"The fatal flaw in the majority opinion is its holding that an amendment can revive a right that has been waived."

Finally, we submit that in this case, and with reference to the issue as to the limitation of the jurisdiction of the State Court of Polk County to try all civil cases without a jury in the absence of a demand therefor by applying the provisions of the Civil Practice Act thereto, we sincerely believe this court has inadvertently overlooked the provisions of:

GA. CODE ANN. 81A-182, JURISDICTION AND VENUE UNAFFECTED

"This title shall not be construed to extend or limit the jurisdiction of the courts or the venue of actions therein."

We submit that to constue the CPA provisions relating to jury trial as preventing the State Court of Polk County from trying a civil case in the absence of a demand for jury is definitely and positively limiting the jurisdiction of that court contrary to the clear prohibition of such construction in the act itself.

Such a construction has deprived appellees of their property rights as citizens of the United States under the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States in that it is not only a failure of due process of law, but contrary to the provision of the statute being construed, and it denies to appellees the equal protection of the laws.

WHEREFORE, Appellees respectfully request that the Supreme Court:

(a) Set aside and vacate the order and judgment in this case of January 19, 1978

(b) Order the clerk of the trial court to transmit those portions of the

record previously omitted

(c) Grant a rehearing to these appellees as to

1. The right of appellant to attack the judgments in the State Court of Polk County cases because of fraud

2. The validity of the amounts of the judgments in the State Court of Polk County cases

3. The issue of res judicata because of the federal court decisions

(d) Enter an order affirming the action of the trial court in granting appellees' motions to dismiss and for summary judgment.

Respectfully submitted

MARSON G. DUNAWAY, JR

CERTIFICATE OF COUNSEL

CERTIFICATE OF SERVICE

ORDER ON MOTION FOR REHEARING

33008

SUPREME COURT OF GEORGIA

Atlanta, February 8, 1978

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Canal Insurance Company v. Bobby C. Cambron, et al.

Upon consideration of the Motion for Rehearing filed in this case, it is ordered that it be hereby denied. All the Justices concur.

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT — Filed Feb 8,

I. Notice is hereby given that BOBBY C. CAMBRON, MARSON G. DUNAWAY, JR. and EVELYN C. HILTON, appellees in Case No. 33008 hereby appeal to the SUPREME COURT OF THE UNITED STATES from the judgment of this Court reversing the judgment of the trial court entered on the 19th day of January, 1978, in which case a Motion for Rehearing was overruled by this Court on the 8th day of February, 1978.

This appeal is taken pursuant to 28 UNITED STATES CODE, Section 1257 (2).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the United States Supreme Court, and include in said transcript the following:

A. The original complaint, with process and entries as to service on defendants Cambron, Dunaway & Hilton.

B. The answer and counterclaim of defendant Dunaway filed on the 24th day

of February, 1977.

C. The motion to dismiss of defendant Dunaway with attachments, and order thereon filed on the 23rd day of February, 1977.

D. The answer and counterclaim of defendant Cambron filed on the 18th day of February, 1977.

E. The plaintiff's amendment to complaint filed on the 8th day of March, 1977, omiting certificate of service.

F. Affidavit of J. Horace Jackson, filed on August 2, 1977.

G. Affidavit of Robert Wedge filed on August 2, 1977.

H. Plaintiff's amendment to the complaint filed on the 13th day of July, 1977.

I. Defendant Dunaway's Motion for Summary Judgment, filed on the 28th day of June, 1977.

J. Defendant Dunaway's Motion for Rule Nisi as to Hearing on Motion to Dismiss, with order thereon, filed on the

21st day of July, 1977.

K. Affidavit of Robert Wedge, dated July 14, 1977 with attachments.

L. First Interrogatory of Canal Insurance Company to Marson G. Dunaway, Jr. filed on the 3rd day of February, 1977.

M. Motion fo Defendant Hilton asserting defense of lack of jurisdiction, insufficient process, insufficient service, and failure to state a claim, filed on the 28th day of July, 1977.

N. Answer and Counterclaim of defendant Hilton filed on the 28th day of July, 1977.

O. Defendants' renewal of motions to dismiss, Motions of Defendant Hilton and Motions for Summary Judgment.

P. Motion of defendants Cambron, Hilton and Dunaway to dismiss re-drafted complaint, filed August 4, 1977.

Q. Affidavit of personal service on defendant Hilton filed on July 28, 1977.

R. Order of trial court relating to service on defendant Hilton, dated August 4, 1977.

S. Supplemental affidavit of Robert Wedge, dated August 10, 1977.

T. Affidavits of Marson G. Dunaway, Jr. and Bobby C. Cambron in support of defendant's Motion for Summary Judgment, filed on the 28th day of June, 1977.

U. Defendants Cambron, Hilton and Dunaway's tender of documents in support of Motions to Dismiss and for Summary Judgment, with attached documents, filed on the 15th day of August, 1977.

V. Amendment to defendants' Motion for Summary Judgment filed on the 28th day of July, 1977, with attached exhibits.

W. Plaintiff's amended and re-written complaint in equity filed August 2, 1977.

X. Certified Records of Canal Insurance Company, filed on August 4, 1977.

Y. Order of Court authorizing and ratifying personal service on defendant Hilton, filed August 4, 1977.

Z. Motion of defendants Cambron, et al, to dismiss re-drafted complaint filed August 4, 1977.

AA. Supplemental affidavit of Robert Wedge filed August 12, 1977.

BB. Plaintiff's Motion for Summary Judgment filed August 12, 1977.

CC. Affidavit of Evelyn Hilton filed August 12, 1977.

DD. Affidavit of Sandra Galloway, Clerk, filed August 15, 1977.

EE. Order of Court on Defendant's Motion to Dismiss and for Summary Judgment, filed August 22, 1977.

FF. Order of Court on Defendant Hilton's plea to jurisdiction filed on August 22, 1977.

GG. Order on Plaintiff's Motion for Summary Judgment filed on August 31, 1977.

HH. Notice of Appeal filed by plaintiff on September 15, 1977.

II. MOtion of Appellees to require transmission of omitted portions of record from trial court to the Supreme Court of Georgia, Appellee's response and objections to the Motion for

Transmission of Additional Portions of Record, and Dismissal of Appellee's Motion for Order Requiring Transmission of additional record.

JJ. Opinion and decision of Supreme Court of Georgia in this case dated January 19, 1978.

KK. Motion for Rehearing filed in the Supreme Court of Georgia in this case.

LL. Order of Supreme Court of Georgia denying the Motion for Rehearing on February 8, 1978.

III. The questions presented by this Appeal are:

1. After the United States District Court, Northern District of Georgia, had assumed jurisdiction of the suit by Cambron against Canal, and had determined said suit and all issues therein in favor of Cambron and against Canal (with the exception of the issue as to whether the judgments against Cambron had been obtained in bad faith, fraud or

collusion) and had stayed the judgments in favor of Cambron in that court for the sole purpose of authorizing Canal to attempt to set aside the judgments because of bad faith, fraud or collusion, was it a denial of due process of law and equal protection of the law under the 14th and 5th Amendments to the United States Constitution for the Georgia Supreme Court to reverse the state trial court's judgment sustaining a defense of res judicata, based on the United States District Court's previous judgment, where no proof of bad faith, fraud or collusion was offered by Canal in the State Court suit?

2. Was it a denial of procedural due process and equal protection of the laws under the United States Constitution, 14th and 5th Amendments, for the Georgia Supreme Court to deny statutory and decisional precedents establishing requirements for securing a review of the trial court's judgment granting summary judgment, and enter judgment for Canal which

these requirements would have forbidden?

3. Was it a denial of procedural due process and equal protection of the laws under the United States Constitution, 14th and 5th Amendments, for the Georgia Supreme Court, without overruling controlling precedents, to refuse to apply them in favor of Cambron?

4. Was it a denial of procedural and/or substantive due process and equal protection of the laws under the United States Constitution, 14th and 5th Amendments, for the Georgia Supreme Court, in the absence of any provision of law authorizing it to do so, to not only reverse the trial court's granting of a summary judgment to Cambron, but enter a partial summary judgment in favor of Canal as to the amounts of the judgments attacked?

5. Was it a denial of due process and equal protection of the laws under the United States Constitution, 14th and 5th Amendments, for the Georgia Supreme Court to hold in this case that an Act

of the Georgia legislature providing for non-jury trials in the State Court of Polk County where a jury was not demanded was contrary to the Civil Practice Act; when it held in the recent case of MARLER V. C & S BANK and cited said case as authority, that the same provision of law was not contrary to the Civil Practice Act when applicable to the State Court of Cobb County?

6. Was it a denial of due process of law and equal protection of the laws, under the 14th and 5th Amendments to the United States Constitution, for the Supreme Court of Georgia to ignore and refuse to implement for appellant's benefit, the express provisions of Georgia Code Annotated, Section 81A-182 that the Civil Practice Act shall not be construed to extend or limit the jurisdiction of the courts or the venue of actions therein, and to hold that a provision of the Civil Practice Act limited the jurisdiction of the State Court of Polk County

to try ex delicto actions without a jury where a jury is not demanded or requested?

Respectfully submitted,

MARSON G. DUNAWAY, JR.
Attorney for Appellants

CERTIFICATE OF SERVICE

ORDER - UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Presently pending in the above styled actions, consolidated for purposes of summary judgment, are motions by Canal Insurance Company to alter or amend the order of February 14, 1977, and the motions of Bobby C. Cambron, Evelyn Hilton, Angela Bale and Charles Bowen for a restraining order, injunction and contempt.

Cavalier Insurance Corp. v. Bowen, C-74-58-R (hereinafter referred to as "Cavalier") included a cross-claim by Canal brought as an interpleader to determine rights to an insurance fund of $20,000.00. Cambron v. Canal Insurance Company, C-74-58-R (Hereinafter referred to as "Cambron:) was a suit by the administrator of the estate of the deceased insured, James Henry Glover, seeking to hold the insurance company liable for the full amount of judgments returned against its insured for its negligence in failing to defend the tort action against its insured. Cambron was brought in state court and removed to this court by Canal. In a consolidated order dated February 14, 1977, it was held that the insurance policy was in full force and effect on the date of the collision giving rise to these suits. Judgment was entered in Cavalier and the proceeds of the interpleader fund ordered

paid to the administrator of the insured's estate subject to the claims of others. Partial summary judgment was granted in Cambron, reserving for trial the issues of excess liability and penalties.

The collision occurred on July 2, 1973, and suits against the deceased insured were brought on July 23, 1973 in the Superior Court of Polk County, Georgia. Canal investigated the accident and filed defensive pleadings without requesting or executing a reservation of rights, but withdrew from the defense on November 1, 1973, three days after the death of the insured, contending that it had cancelled the policy prior to the collision and was therefore under no duty to defend. Default judgments were entered in the two negligence cases for $100,000.00 and $250,000.00.

Canal now claims that these state court judgments were obtained through fraud, collusion or bad faith, and that this is an issue in both of the consolidated cases which should be determined by the court. Thus, the insurer argues that judgment should not have been entered on the cross-claim in Cavalier but that the claimants should have been required to interplead any claims to the fund, and that the issues of fraud and bad faith should be reserved for trial in Cambron. Prior to the order of February 14th, Canal filed an action in the Superior Court of Polk County Georgia, to set aside the judgments under

that a federal district court does not sit as an appellate tribunal to review state court judgments. See Hill v. McClellan, 490 F.2d 859 (5th Cir. 1974); Hanna v. Home Insurance Co., 281 F.2d 298 (5th Cir. 1960). However, a federal court may entertain a collateral attack on a state court judgment which was obtained by extrinsic or collateral fraud and is void on its face. Diehl v. United States, 438 F.2d 705 (5th Cir.) cert. den. 404 U. S. 830, 92 S. Ct. 67, 30 L.ED.2d 59 (1971); see also United States v. Throckmorton, 98 U. S. 61, 25 L.Ed. 93 (1878). Under Section 81A-160(a) of the Georgia Code:

> Any judgment void on its face may be attacked in any court by any person. In all other instances, judgments shall be subject to attack only by a direct proceeding brought for that purpose in one of the methods hereinafter prescribed.

Questions of intrinsic fraud must be raised by a direct attack in the state courts and must be based upon acts of the adverse party "unmixed with the negligence or fault of the complainant." Ga. Code Ann. 81A-160(e). They may not be pursued by a collateral proceeding in the federal court.

Ga. Code Ann. 81A-160 and requested that the suit be stayed until final judgment in the federal suits.

The claimants to the insurance fund in Cavalier were the insured and his two judgment creditors whose claims have been liquidated by the state court actions. As noted in footnote 4 of the February 14th order, these claims did not technically expose Canal to a threat of double or multiple liability but interpleader was justified at the time to protect the company against the vexation of multiple lawsuits.

This court also had ancillary jurisdiction over the cross-claim. See order of July 30, 1976.

It now appears that the cross-claim was not, in fact, a correct interpleader action in which the injured parties were required to litigate their claims to the fund, but jurisdiction was proper as ancillary and as a diversity action on the insurance contract. The statute of limitations has run on any claims arising out of the accident and Canal is no longer threatened with a vexation of multiple lawsuits. Ga. Code Ann. 3-1004. The injured parties are not required to relitigate their demands against the insured in this forum.

Canal urges that this court must still decide whether the state court judgments were obtained through bad faith, fraud or collusion. At the outset, it must be noted

It is not clear from the pleadings whether the insurer is asserting intrinsic or extrinsic fraud. In any event, a case is presently pending in Polk County Superior Court to set aside the judgments. That forum may address the issues of both intrinsic and extrinsic fraud and clearly has jurisdiction to set aside the judgments. Therefore, this court must stay the federal actions pending resolution of the state court suit to set aside the judgments.1/

The insured and judgment creditors filed a motion for injunctive relief against the pending state court action and for contempt, alleging that the insurer acted in bad faith by filing the state suit, which the movants claim was in violation of the stays imposed by this court

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1/ While the insurance company claims that it may assert bad faith of the insured as a defense to the contract, that defense is appropriate only where the insured entered into a settlement with the injured parties and is not a defense to a judgment. Under the terms of the contract, Canal agreed to pay on behalf of the insured "all sums which the insured shall become legally obligated to pay..." The company also agreed to defend "any suit against the insured alleging such injury..... even if such suit is groundless, false or fraudulent."

in prior orders. It was necessary for the insurance company to file the suit to avoid the statute of limitations and it did not act in bad faith justifying contempt. In view of the principles espoused in this order, an injunction against the state court action is not warranted.

Accordingly, the motion of Canal Insurance Company to reconsider and alter or amend the order of February 14, 1977, is granted to the extent that the judgment on the cross-claim in Cavalier Insurance Corp. v. Bowen, C-74-68-R, is vacated pending resolution of the state court action to set aside the judgments. Further action in both Cavalier and Cambron v. Canal Insurance Co., C-74-58-R, is stayed until final resolution of that state suit. In all other respects, the motion to alter or amend is denied and the February 14, 1977 order is affirmed. The motion of Cambron, Hilton, Bale and Bowen for an injunction and contempt is denied.

So ordered this the 9th day of May, 1977.

s/ Albert J. Henderson, Jr.
Judge, United States District Court for the Northern District of Georgia

ORDER - UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

The above styled actions were consolidated by order of November 19, 1976, for the purpose of deciding two similar motions for summary judgment. Presently pending are the summary judgment motions by Canal Insurance Company, cross-claimant in Cavalier Insurance Corp. v. Bowen, et al, Civ. No. C-74-68-R (hereinafter referred to as "Cavalier"), and by Bobby C. Cambron, plaintiff in Cambron v. Canal Insurance Co., Civ. No. C-74-58-R (hereinafter referred to as "Cambron"). Both motions were resubmitted after responses pursuant to the order of November 19.

The suits are just two of several actions arising out of an automobile accident on July 2, 1973. Because of the checkered substantive, procedural and factual history of these and related cases, and the awkward procedural posture of the presently pending claims, the background should be examined in detail.

Only July 2, 1973, Wesley Hilton, Evelyn Bowen Hilton, and their two minor children, Charles Bowen and Angela Rena Bale, were passengers in a taxicab operated by James Henry Glover and allegedly insured by Canal Insurance Company, when it collided with a motor vehicle driven by Richard Calvin Head and insured by

the Cavalier Insurance Corporation. The accident occurred at the intersection of Georgia Highway 101 and the Nathan Dean By-pass in Polk County, Georgia. It appears from the record1/ that Richard Head was intoxicated and ran a stop sign striking the taxicab in which the Hiltons were passengers. Head was killed instantly and James Glover and Wesley Hilton sustained critical injuries. Evelyn Bowen Hilton was also injured.

On July 23, 1973, Evelyn Hilton filed two suits against Glover, the driver of the taxi, in the State Court of Polk County, Georgia, one in her own behalf and the other as next of friend for her husband who was then hospitalized as a result of the injuries suffered in the accident. Wesley Hilton died on August 12, 1972 and James Glover died on October 29, 1973. In both cases, the administrator of Glover's estate, Bobby C. Cambron, was substituted as a party defendant. F. L. Hagan, administrator of the estate of Wesley Hilton, was allowed to "amend the complaint" in the action on behalf of his

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1/ See Cavalier accident report, Exhibit A to plaintiff's complaint in Cavalier Insurance Corp. v. Bowen, and the deposition of Evelyn Hilton of September 13, 1974.

deceased, showing that the plaintiff had died as a result of the injuries, but the administrator was never formally made a party to that suit.2/ The nominal parties in both actions were all citizens of Georgia.

Canal Insurance Company, as Glover's insurer, was notified of the accident and claims by letter of July 23, 1973, and received July 25, 1973. The insurance company then made an investigation and deciding that Glover had a valid defense, filed defensive pleadings in his behalf in both state suits on August 18, 1973, without requesting or executing a

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2/ At the trial of the case for Wesley Hilton's death, the court asked plaintiff's attorney, "...and this is a suit by the mother in the interest of the child, is that correct?" to which the attorney replied, "Yes, sir, that is correct." Trial transcript at 2. Under Georgia law, the children have a cause of action for the wrongful death of a parent only where there is no surviving parent. Otherwise a suit for wrongful death is in the surviving spouse. 105-1302, Ga. Code Ann. The administrator of the estate has a separate cause of action for funeral and medical expenses, 105-1310, Ga. Code Ann., or for wrongful death on behalf of the next of kin where there is no immediate family surviving. 105-1309, Ga. Code Ann.

reservation of rights. Canal's insurance policy contained the standard clause in which the company agreed to defend actions against its insured.

On October 24, 1973, three months after the suits were filed and five days before Glover's death, counsel for Canal informed the parties that he was withdrawing from the defense under instructions from the insurance company, which contended that Glover's insurance policy was not in effect at the time of the collision. On November 1, 1973, Canal's attorney filed an ex parte motion to withdraw as counsel which was granted on that date by the state court judge.

By letter of November 9, 1973, Glover's personal attorney protested Canal's withdrawal asserting that the insurance was in effect; and on December 26, 1973, counsel for the Hiltons notified Canal's attorney that the pleadings were still of record and that the case would be called for trial in January of 1974. Canal, through its attorney, refused to further defend or appear, and on January 7, 1974, the Clerk of court, Bobby C. Cambron, was duly appointed administrator of Glover's estate and substituted as defendant. No one appeared to represent the defendant. The defensive pleadings were struck and a default judgment was entered in both actions against the Glover estate, in the

amounts of $100,000.00 and $250,000.00.[3/]

Thereafter, the Hiltons' attorney, now representing the administrators of both Hilton's and Glover's estates, formally demanded that Canal pay the judgments. Canal refused and in March of 1974, Evelyn Hilton and F. L. Hagan, administrator of Wesley Hilton's estate, and Cambron, as administrator of Glover's estate, brought two separate actions against Canal in state court. Cambron sought to recover the full amount of the judgments under a theory of tort liability, and Evelyn Hilton asked for $20,000.00 under the insurance policy. Cambron's suit was removed by Canal to this court on April 12, 1974.

On April 29, 1974, Richard Head's insurer, Cavalier Insurance Company, admitting the liability of its insured, filed an action in federal court, and in Count I interpled all claimants to its insurance fund. In Count II, Cavalier, naming Canal as defendant, sought a declaratory judgment as to Canal's insurance and its

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3/ Although Glover had a personal lawyer until his death, there apparently were no assets in his estate to justify the appointment of an administrator, except the insurance policy, under which liability was limited to $10,000.00 per person and $20,000.00 per accident.

effect on Cavalier's uninsured motorist liability. Canal filed a cross-claim against Cambron and the judgment creditors, seeking to adjudicate its obligations under Glover's policy, or in the alternative, a distribution of the proceeds and a discharge from further liability, as well as a stay of all actions against it. By order of July 2, 1974, the parties were enjoined from prosecuting further to recover on Canal's policy, and the pending cases, including Cambron's suit removed to federal court, and Hilton's suit in state court, were stayed until resolution of the cross-claim.4/

4/ Although both Count I of Cavalier's main claim and Canal's cross-claim were originally entertained as statutory interpleaders under 28 U.S.C. 1335, and stays imposed pursuant to 28 U.S.C. 2361, there in fact existed no diversity among the claimants to either fund as all were citizens of Georgia. Wesley Hilton's brothers, Robert F. and Dudley C. Hilton, citizens of Pennsylvania, were originally named as "potential claimants" to the Cavalier fund, but the stakeholder stipulated prior to its summary judgment motion, that these parties had no legally cognizable claim to the fund under Georgia law and in fact had asserted none. See Helis v. Vallee, 34 F.Supp. 467 (D. La. 1940), aff'd 119 F.2d 118, cert. den.

The claimants to Cavalier's fund settled Count I of the main action, and by order of March 10, 1975, amended March 25, 1975, the proceeds were distributed in accordance with the agreement. Thereafter, Count II wa voluntarily dismissed on July 21, 1975.

4/(Cont'd) 314 U.S. 644, 62 S.Ct. 85, 86 L.Ed. 517.

However, there was diversity between the stakeholders and claimants. The claims to Cavalier's insurance proceeds in the main action were in excess of the fund and did expose Cavalier to a threat of double or multiple liability. Therefore, there was jurisdiction over Count I for interpleader, Rule 22, Fed. R. Civ. P. The subsequent preliminary injunctions issued in that case were arguably justified under 28U.S.C. 2283. See Maryland Casualty Co. v. Glassel-Taylor & Robinson, 68 F.Supp. 897 (W.D. La. 1946). In any event, the main action was subsequently settled.

Canal's cross-claim, although denominated a statutory interpleader, was also not proper under 28 U.S.C. 1335 as there was no diversity among the claimants. However, there was diversity between Canal, as a stakeholder, and the claimants who were all Georgia citizens. Although the claims were those of the insured and his judgment creditors and did not expose Canal to a threat of double or multiple

Canal's liability remained undetermined and on June 4, 1976, Canal filed a motion in Cavalier for a default judgment on the cross-claim, or in the alternative, for summary judgment. Hilton and Cambron submitted a brief in opposition to Canal's motion for summary judgment and filed a motion for summary judgment on their behalf in Cambron, the action brought by Glover's administrator in state court and stayed after its removal to federal court.

Hilton and Cambron failed to answer the cross-claim, and Canal did not respond to their motion for summary judgment in the

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4/(Cont'd) liability, it was threatened with the "vexation of multiple lawsuits." See National Fire Insurance Co. v. Sanders, 38 F.2d 212 (5th Cir. 1930); 3A Moore's Federal Practice, 22.02[1]. It is immaterial whether the danger apprehended comes from suits pending or merely anticipated. United States v. Estate of Swan, 441 F.2d 1082 (5th Cir. 1971). Therefore, the cross-claim was justified under Rule 22(1), Fed.R.Civ.P., see State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 87 S.Ct. 1199, 18 L.Ed.2d 270 (1967); Georgia Savings Bank & Trust Co. v. Sims, 321 F. Supp. 307 (n.D. Ga. 1971); Haynes v. Fleder, 239 F.2d 868 (5th Cir. 1957); Austin v. Texas-Ohio Gas Co., 218 F.2d 739 (5th Cir. 1955); Ellington v. Metropolitan Life Insurance Co., 217 F.2d 609 (5th Cir. 1954), and the stays warranted under 28 U.S.C. 2283.

stayed action. Since both motions involved the issues of whether Canal properly cancelled the insurance policy before the collision and the effect of its withdrawal from the defense of the suits against Glover, these federal cases were ordered consolidated and the stay lifted for purposes of the motions. Cambron and Hilton answered the cross-claim, and Canal was directed to respond to the claimant's motion for summary judgment in Cambron. The two summary judgment motions are now before the court.5/

5/ Interpleader, by its nature and definition, requires the parties to assert their demands to the fund in the interpleader forum to avoid a multiplicity of suits. Moreover, issues of independent liability may be raised in the same action. See 3A Moore's Federal Practice, 22.14[3]. Through inadvertance, the court order of July 2, 1974, allowing the interpleader, did not expressly require the claimants to state their claims to the fund in this forum but merely said that they "may choose" to do so. Bobby C. Cambron and Evelyn Hilton's causes of action against Canal were formally joined in Cavalier when their answer to the cross-claim was filed, but these defendants have not affirmatively pressed their claims against Canal in the interpleader, but have filed affirmative motions in the stayed actions. By order of November 19, 1976,

Canal moves for summary judgment on its cross-claim in Cavalier claiming that Glover's insurance policy was effectively cancelled prior to the accident. Moreover, the insurance company argues that it is not estopped to deny coverage by virtue of its filing defensive pleadings without a reservation of rights as the defense allegedly was not undertaken with a knowledge of its grounds of non-liability.

The defendants on the cross-claim contend that the insurance was not effectively cancelled for several reasons. They claim that a premium finance agreement giving the finance company a power of attorney to request cancellation of the policy on behalf of the insured was never formally executed by the company and was therefore not in effect. They

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5/(Cont'd) the stay was lifted in Cambron, the only other federal suit, and it was consolidated with Cavalier in order to allow the court to address Cambron's suit against Canal without requiring him to formally file a separate motion in the interpleader.

The remaining defendants on the cross-claim have not answered and are technically in default, but a default judgment has not been entered against these parties and in fact should not be since their silence appears to be the result of the permissive as opposed to compulsory language of the July 2, 1974, order.

further urge that the requisite statutory notices of cancellation were not sent to the insured or the necessary notice given to the Rockmart, Georgia, Police Department through the city clerk. Finally, they allege that the insurance company is estopped to deny coverage because it initially defended the suits against the insured without a reservation of rights.

Glover's administrator, as plaintiff in Cambron, moves for summary judgment in that case claiming that the policy was in effect at the time of the collision because the required notices were not given and the company's filing a defense without a reservation of rights not only estops Canal from denying liability, but its withdrawal from the cases makes it liable in tort for the entire amount of the judgments plus costs and attorney's fees as opposed to the $20,000.00 limitation of liability under the policy. Cambron also seeks to recover penalties and attorney's fees incurred in prosecuting the subsequent actions on the judgments, claiming that Canal acted in bad faith in refusing to pay the claims or settle.

As a defense to liability beyond the policy limits, Canal maintains that its withdrawal from the suit was not tortious and that, in any event, the judgments were obtained by fraud,6/ collusion and

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6/ On January 6, 1977, Canal filed a complaint in equity in the Superior Court of Polk County seeking to set a-

other wrongful acts.

A policy of liability insurance was issued by Canal to Glover through its general agent, Strickland General Agency, Inc., pursuant to an application made by him on September 26, 1972, with the Cobb Insurance Agency. The policy, No. 79-60-77, was effective October 1, 1972, and provided for limited liability in the amount of $10,000.00 per person and $20,000.00 per accident. The form, entitled an "Application for Commercial Motor Vehicle Liability and Physical Damage Insurance," was supplied and prepared by Strickland specifically for commercial vehicle insurance, and in item 12 requested "liability information necessary for filings." The application stated that the insurance was for Glover doing business as James Glover Taxi and included the notation, "Statement of ins. for Rockmart Police Department." It was executed by Glover and Harold Major, as "agent", and stated that the application and information thereon would become a part of the insurance policy when issued.

In effect on the date of the application and thereafter was Rockmart, Georgia, City Ordinance #210 which provided, in relevant part, that before any license

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6/(Cont'd) side the judgments against Glover, to avoid the three year statute of limitations, 81A-160 Ga. Code Ann.

for the operation of a taxicab could be issued, a policy of public liability and property damage insurance executed by a solvent insurance company licensed to do business in the state must be filed with the city clerk, and that the insurance must provide a minimum liability of $1,000.00 and include an endorsement stating that the policy could not be cancelled by the company or the insured without ten days notice to the city clerk, beginning the date the notice was actually received in the Clerk's office. At the time of the collision, July 2, 1973, by Canal's own proof, there was on file in the office of the City Clerk of Rockmart, Georgia, a copy of the insurance policy issued to James Glover by Canal with the following notation handwritten thereon:

> Certificate of Liability Insurance
> For: James Glover dba
> James Glover Taxi
> 430 Jackson St.
> Rockmart, Ga.

The document on file apparently did not include the required endorsement but had stapled to it the business card of Cobb Insurance Agency, Harold Major.

The annual premium on the policy was $1,102.00. Glover made a cash down payment of $332.00 and on the date of the application, executed a standard premium finance agreement with Baker Finance Company, co-signed by Harold Major, Cobb

Insurance Co., as agent. The agreement, prepared by the finance company, provided that Baker would immediately pay to Canal the balance due on the insurance premiums and that Glover would repay Baker in nine installments of $92.44 each, due the first of each month beginning November 1, 1972. Under the terms of the contract, Glover appointed Baker as his attorney-in-fact with the power to request cancellation of the policy upon default after a period of ten days.

Also in effect at the time that the premium finance agreement was executed and at all relevant times thereafter, was Georgia's Insurance Premium Finance Company Act, 84-5301 et seq., Ga. Code Ann., which provides in 83-5312:

> (a) When a premium finance agreement contains a power of attorney enabling the premium finance company to cancel any insurance contract or contracts listed in the agreement, the insurance contract or contracts shall not be cancelled by the premium finance company unless such cancellation is effectuated in accordance with this section.
> (b) Not less than 10 days' written notice shall be mailed to the insured of the intent of the premium finance company to cancel the insurance contract unless the default is cured within such 10-day period. A copy of said notice shall also be sent to the insurance agent or insurance broker indicated on the premium

> finance agreement.
> (c) After expiration of such 10-day period, the premium finance company may thereafter in the name of the insured, cancel such insurance contract or contracts by mailing to the insurer a notice of cancellation, and the insurance contact shall be cancelled as if such notice of cancellation had been submitted by the insured himself, but without requiring the return of the insurance contract or contracts. The premium finance company shall also mail a valid notice of cancellation to the insured at his last known address and to the insurance agent or insurance broker indicated on the premium finance agreement.
> (d) All statutory, regulatory, and contractual restrictions providing that the insurance contract may not be cancelled unless notice is given to a governmental agency, mortgagee, or other third party shall apply where cancellation is effected under the provisions of this section. The insurer shall give the prescribed notice in behalf of itself or the insured to any governmental agency, mortgagee, or other third party on or before the second business day after the day it receives the notice of cancellation from the premium finance company and shall determine the effective date of cancellation taking

consideration the number of days required to complete the cancellation.

On January 17, 1973, Baker mailed notices to Strikland and Glover stating that the insurance policy had been "cancelled" earlier, on January 3, 1973, for nonpayment of premiums, but that Baker had received the delinquent payment, and that if Canal were willing to reinstate the policy, formal notice should be sent to all parties. On January 30th, Canal, through Strickland, wrote to Cobb Insurance Agency that it had no prior knowledge of a cancellation of the policy and that it was in full force and effect.

Richard C. Perry, president of Baker since March of 1974, states by affidavit that Glover failed to pay the premium due on April 1, 1973, and that, from his personal knowledge and Baker's business records, that the finance company mailed to Glover on April 12, 1973, a notice of intent to cancel if he did not cure the default within 10 days.

Thereafter, on April 25, 1973, Baker claims to have sent a "notice of cancellation" to the insured and to Canal through Strickland, stating that the policy was cancelled as of May 7, 1973, for nonpayment of a premium installment. This notice from the finance company contained the following language:

> If the policy or any statute requires the insurer to give notice

> to a mortgagee, governmental agency, or other third party before the policy can be cancelled, the insurer shall give the prescribed notice in behalf of itself or the insured to any governmental agency, mortgagee, or other third party on or before the second business day after the day it receives the notice of cancellation from the premium finance company and shall determine the effective date of cancellation taking into consideration the number of days notice required to complete the cancellation.

The April 25th notice of cancellation was received by Strickland on May 17th, and on May 18th Baker again sent a notice to the insured and to Canal, through Strickland, that the delinquent payment had been received and requested reinstatement. This notice was received by Strickland on May 23rd. On that same date, Strickland claims to have sent a "notice of cancellation: on behalf of Canal to Glover specifying a cancellation date of June 4th, 1973, and stating that the policy was cancelled for nonpayment of premiums. The notice said:

> In order to rescind this notice the amount shown below must be paid to the agent from whom the policy was purchased, and must be received by the company before the effective date of cancellation.
>
> | | |
> |---|---|
> | Contact Baker & Co. | REINSTATEMENT PAST DUE PREMIUM TOTAL DUE TO REINSTATE POLICY |

This is the ultimate cancellation upon which Canal relies.

On May 23, 1973, Baker purportedly mailed to the insured and to Canal another notice of cancellation which indicated a cancellation date of June 4, 1973, and requested a pay-off of $282.32. This notice also contained the language concerning the requisite notice to a governmental agency before cancellation.

In August of 1973, Baker requested that Canal return the unearned premium in the amount of $282.32. However, Canal changed the amount due from $282.32 to $96.90 and mailed the latter amount to Baker on August 23, 1973.

Regulations respecting the cancellation of insurance policies covering vehicles of public conveyance are for the protection of the general public and injured third parties. See Liberty Mutual Insurance Co. v. Coburn, 129 Ga. App. 520 (1973); Garden City Cab Co., Inc. v. Fidelity and Casualty Co., 80 Ga. App. 850 (1950); Zachry v. City Council of Augusta, 78 Ga. App. 746 (1949). To effectively cancel the insurance as against third persons, the regulations and statutes must be strickly followed. See Spicer v. American Home Assurance Co., 292 F. Supp. 27 (N.D. Ga. 1967). Statutory regulations governing the cancellation of insurance policies pursuant to a premium finance agreement are designed to protect the insured who is party to the contract, and these regulations must also

be complied with in order to cancel the policy on behalf of the insured.

The Georgia Premium Finance Company Act in 84-5312(d), Ga. Code Ann., incorporates all statutory, regulatory and contractual provisions regarding cancellation of insurance on vehicles of public conveyance and the required notice to governmental agencies where the insurance is to be cancelled in accordance with a premium finance agreement. Therefore, in this instance, three steps are necessary to cancel the policy as against both the insured and the general public: (1) The premium finance company must give written notice to the insured of its intent to cancel if default is not cured within ten days; (2) a second notice by the premium finance company of its request to the insurance company for cancellation must be sent to the insured if the deficiency is not corrected within ten days or otherwise to their satisfaction; and (3) the insurance company must send a final notice of cancellation to the proper governmental agency or other third party and to the insured. The statute places the burden of notifying the governmental agency upon the insurer, for the final effective date of cancellation is within its exclusive knowledge and control.

Canal Insurance Company contends that if there was no cancellation under 84-5312

of the Premium Finance Company Act, the policy was properly cancelled by the provisions of Georgia's General Insurance Code, 56-2430, Ga. Code Ann., which specifies that the insurer may cancel an insurance policy for statutorily delienated reasons merely by giving 10 days notice to the insured where it is due to the non-payment of premiums.

However, 56-2430 was amended in 1968 to provide in 56-2430.1 that "policy" as used in that section means only:

> ...a policy...under which the insured vehicles therein designated are of the following types only: (i) A motor vehicle of the private passenger, station wagon or jeep type that is not used as a public or livery conveyance for passengers, nor rented to others.

Thus, that code section does not apply to cancellation of insurance on taxicabs. Furthermore, 56-2430 states that cancellation may be accompanied only for specific reasons, including non-payment of premiums, "whether payable directly to the insurer or indirectly under any premium finance plan...." As a result of the premium finance agreement, Canal had received full payment from the financing agency, and any alleged non-payment of premiums could only be a debt to the financing agency. An insurer cannot by-pass the requirements of the Insurance Premium Finance Company Act 84-5312, Ga. Code Ann.,

by construing default under the premium finance agreement as a constructive non-payment of premiums to the insurer, thereby entitling it to directly cancel the policy without a request from the insured through its attorney-in-fact.

Reading the two statutes together, upon default under a premium finance agreement, the insurer may directly cancel the policy under 56-2430 by notifying the insured of the final cancellation and effective date only after compliance with the three steps prescribed in 84-5312. See Garber v. American Mutual Fire Insurance Co., 131 Ga. App. 366 (1974), in which the two statutes are construed together and applied to a Baker & Co. premium financing agreement. Therefore, all three steps heretofore outlined must be followed in order to cancel the policy issued by Canal to Glover.

The defendants on the cross-claim argue that the premium finance agreement was never formally executed by Baker & Co. and therefore, by its own terms was not in effect and did not give the finance company a power of attorney to cancel. However, in view of the subsequent compliance with the contract by both parties, it must be concluded that, at a minimum, Baker ratified the agreement.

As noted above, the collision occurred on July 2, 1973, the insurance company was notified on July 23, 1973 of

the suits filed on that date and after investigating, filed defensive pleadings on August 18, 1973. After withdrawing its defense on October 24, 1973, Canal claimed that the insurance policy was cancelled on June 4, for non-payment of premiums. In moving now for summary judgment, Canal says that the notices sent to the insured prior to and including the notice of April 23, 1973, terminated the policy on June 4, 1973.

Canal admits that notice of cancellation was never sent to the Rockmart city clerk or police department, but contends that such notice was not necessary by the terms of the policy and that it was never informed of the ordinance requirements. However, notice to the city clerk was required under the contract and by operation of law. The application form became a part of the insurance policy, and the notation in item 12 of the application sufficiently notified the company of the required filings.7/

7/ Neil Strickland states by deposition that if the application had written thereon "Certificate" of insurance for Rockmart Police Department, as opposed to "Statement" of insurance, the company would have complied with the ordinance. Deposition of September 13, 1974 at 44-45. This distinction is tenuous. The ordinance requires that a "policy" of insurance be filed and the clear intent of the statute and ordinance may not be defeated by the insurer's verbal distinctions.

As stated, the purpose of requiring insurance and notice of cancellation is for the protection of the public, Spicer v. American Home Assurance Co., supra, and the obligations imposed by the statute and ordinance clearly supersede the policy provisions. American Casualty Co. v. Southern States, Inc., 70 Ga. App. 22 91943); Great American Indemnity Co. v. Durham, 54 Ga. App. 353 (1936). The city ordinance and Georgia Premium Finance Company Act were in full force and effect at the time the insurance policy was issued. All existing and valid statutory and regulatory provisions extend into and form an integral part of all contracts of insurance to which they are applicable. Thames v. Piedmont Life Insurance Company, 128 Ga. App. 630 (1973); see also American Casualty Co. v. Irvin, 426 G.2d 647 (5th Cir. 1970). Therefore, the policy was in effect, at least as it affected the general public on the date of the accident. Garden City Cab Co. Inc. v. Fidelity & Casualty Co., supra; see also Midstate Hauling Co. v. Reliance Ins. Co., 437 F.2d 616 (5th Cir. 1971); Amalgamated Casualty Ins. Co. v. Winslow, 135 F. 2d 663 (D.C. Cir. 1943).

Also, Canal has failed to show that the required notices were given to the insured. Although the affidavit of Richard Perry, president of Baker since March of 1974, states that notice of in-

tent to cancel was mailed to Glover on April 1, 1973, a verified copy of the notice was not submitted, nor is any reason given for its unavailability. In view of the fact that multiple copies of other notices were carefully preserved, and the fact that 84-5308 requires that the finance agency keep records of its transactions coupled with the requirements of 84-5312(c) that a copy of the notice of intent to cancel be furnished the agent or broker executing the finance agreement, primary evidence should be readily available.

Under Rule 56(d), Fed.R.Civ.P., affidavits in support of a motion for summary judgment must set forth such facts as would be admissible in evidence and sworn or certified copies of all documents referred to in the affidavit should be attached thereto or served therewith. Perry's unsupported oral testimony may not be considered on the motion for summary judgment. See Rule 1004, Red. Rules of Evidence.8/

Although Canal claims to have mailed a final notice of cancellation on April

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8/ Even if such evidence were admissible, it would be insufficient in this instance to support a finding of fact that the notice of intent to cancel was given. See Allstate Insurance Co. v. Code, 123 Ga. App. 265 (1971).

25, 1973, and submitted a certificate of mailing from the post office showing that something was mailed to Glover by Canal on that date, and the attached affidavit of Neil Strickland states that the item mailed was the cancellation notice. Strickland said in his deposition of September 13, 1974, at 24-25, that he in fact did not personally mail the notice. In view of Cambron's contention that Glover did not receive such notice, there is at a minimum an issue of fact for trial as to whether the item mailed actually was the alleged final notice of cancellation. Atlanta Casualty Co. V. Williams, 139 Ga. App. 732 (1976); Harris v. United States Fidelity & Guaranty Co., 134 Ga. App. 739 (1975); Allstate Insurance Co. v. Cody, 122 Ga. App. 265 (1971).

Canal has filed to show that the required notice of cancellation was given either to the governmental agency concerned or to the insured. Therefore, its motion for summary judgment is denied.

Cambron insists that even if the required notices were given, the insurer is estopped to deny that the policy was in effect by (1) its past practice of reinstatement upon payment, (2) retention of sufficient premiums to keep the policy in effect through August 14, 1973, and (3) defending the personal injury actions without a reservation of rights.

Even though notice of cancellation is mailed to the insured, the agent's acceptance of premiums and ratification by the insurer estops the company from denying coverage. Progressive Fire Insurance Co. v. Morrison, 72 Ga. App. 473 (1945). Canal's custom of reinstating, the policy upon receipt of the delinquent premium and the fact that the April installment was received by Baker which in turn notified Canal bars the assertion of noncoverage. See The Alabama Gold Life Ins. Co. V. Garmany, 74 Ga. 51 (1884).

It should be pointed out that Canal returned only $96.90 to Baker and retained sufficient premiums to keep the policy in force through August 14th even under the short rate rebate. Canal contends that this merely entitled the insured or the finance company to an additional rebate, but did not affect the cancellation date. As stated by the Georgia Supreme Court in German American Mutual Life Association v. Farley, 102 Ga. 720 at 743 (1897), "the difficulty with this offer of restriction is that it came too late." The retention of premiums operates as an additional estoppel.

Finally, where a liability insurer, with knowledge of a ground of forfeiture or noncoverage assumes and conducts the defense of an action without disclaiming liability and giving notice of its reservation of rights, it is therefore precluded from denying coverage. Richmond v.

Georgia Farm Bureau & Co., 140 Ga. App. 215 (1976); Winters v. Government Employees Insurance Co., 132 Ga. App. 756 (1974); State Farm Mutual Automobile Insurance Co. v. Anderson, 104 Ga. 815 (1961); Jones v. Georgia Casualty & Surety Co., 89 Ga. App. 181 (1953); see also, Fidelity and Casualty Co. v. Riley, 380 F.2d 153 (5th Cir. 1967).9/

Delay in giving notice of reservation of rights will be excused where it is traceable to the insurer's lack of actual and constructive knowledge of a defect. State Farm v. Anderson, supra. Canal claims that it did not know of the lack of coverage at the time it filed defensive pleadings. At the same time it says it sent cancellation notices to Glover as early as April 25, 1973, and paid the rebate on August 23, 1973. Knowledge of material facts on the part of the insurer's agent is constructive notice to the company. Metropolitan Life Insurance Co. v. McAleer, 43 Ga. App. 669 (1931). Consequently, Canal defended with constructive knowledge of the alleged defect.

Cambron is entitled to a declaration that the insurance policy was in force

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9/ The fact that the claims exceed the insurer's liability does not excuse it from the duty to defend. Smoot v. State Farm Mutual Automobile Insurance Co., 299 F.2d 525 (5th Cir. 1962).

as to both the insured and the third parties at the time of the accident.

Cambron further urges that Canal's breach of its duty to defend created a tort action for damages and that the insurer is, therefore, liable to the insured for the entire amount of the judgment including that in excess of the policy limits. See Gordon v. Nationwide Insurance Co., 334 N.Y.S.2d 601, 285 N.E.2d 849, 30 N.Y.2d 427, cert. den. 410 U.S. 931, 93 S.Ct. 1374, 35 L.Ed.2d 593; 7A Appleman, Insurance Law & Practice, 4689.

If Cambron were suing on the contract for bad faith refusal to pay, requiring prosecution of the case against the insurer, his damages would be limited to the statutory penalty of attorney's fees plus 25% of the liability under the policy. 56-1206 Ga. Code Ann. However, where the insured's suit is not on the contract, but rather in tort and involves a duty and alleged breach, the cited statutory provision does not apply. United States Fidelity & Guaranty Co. v. Evans, 116 Ga. 93 (1967); Cotton States Mutual Insurance Co. v. Phillips, 110 Ga. App. 581 (1964), cert. den. 110 Ga. App. 895; see Smoot v. State Farm Mutual Automobile Insurance Co., 299 F.2d 525 (5th Cir. 1962); Shaw v. Caldwell, 229 Ga. 87 (1972).

On the other hand, whether the insurer acted reasonably in failing to defend or to settle the personal injury cases is

a question of fact for the jury, and summary judgment on this issue is not warranted. Moreover, Cambron failed to show that Canal refused to settle after an opportunity to do so.

In summary, the insurance policy was in full force and effect at the time of the collision, July 2, 1973, leaving for trial the issues of Canal's negligence in failing to defend the personal injury actions and bad faith for refusing to settle after judgment, and hence its liability for the excess judgments as well as penalty and attorney's fees.

Accordingly, Canal Insurance Company's motion for summary judgment in Cavalier Insurance Corp. v. Bowen, Civ. No. C-74-68-R, is denied; and summary judgment is granted in favor of the defendants on the cross-claim.10/ The clerk of court is

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10/ No formal motion for summary judgment in Cavalier, Civ. No. C-74-68-R, was made by the defendants on the cross-claim, although the plaintiff moved for summary judgment in Cambron, Civ. No. C-74-58-R. However, the defendants, in their briefs in both actions urge that the "motions" of Hilton and Cambron be granted. Summary judgment may be granted to the nonmoving party without a formal motion where there is no material factual dispute, and he is entitled to judgment as a matter of law. 6 Moore's Federal Practice, 56.12, n. 6 and cases cited

directed to enter judgment against Canal and to pay the proceeds of the interpleaded fund to Bobby C. Cambron, as administrator of the estate of James C. Glover subject to the lawful claims of others.

An interlocutory adjudication as to Canal Insurance Company's liability under the policy is granted to the plaintiff, Bobby C. Cambron, in Cambron v. Canal Insurance Company, Civ. No. C-74-58-R, but summary judgment for the excess judgments as well as penalty and attorney's fees is denied without prejudice, leaving those issues and defenses thereto for trial.

All stays imposed by the order of July 2, 1974, are hereby removed.

10/ (Cont'd) therein; see also Black Warrior Electric Membership Corporation v. mississippi Power Company, 413 F.2d 1221 (5th Cir. 1969). Rule 55, Fed. R.Civ.P., permits a trial court to consider the merits of the action and grant judgment as to all defendants if the liability is joint, in spite of the fact that some defendants may have failed to answer. Roach v. Churchman, 431 F.2d 849 (8th Cir. 1970); see 6 Moore's, supra, 55.06. In view of the procedural entanglement causing delay in these cases in the past, summary judgment is proper in the absence of answers or motions.

So ordered this the 14th day of Feb. 1977.

s/ Albert J. Henderson Jr.
Judge, U.S. District Court Northern Dist. Ga.

GA. CODE ANN. 6-805 (f)

" Where any party contends that the transcript or record does not truly or fully disclose what transpired in the trial court.. .... The trial court or the appellate court may at any time order the clerk of the trial court to send up any original papers or exhibits in the case, to be returned after final disposition of the appeal."

(i) . " In lieu of sending up a transcript of record, the parties may by agreement file a stipulation of the case showing how the questions arose and were decided in the trial court, together with a sufficient statement of facts to enable the appellate court to pass upon the questions presented therein."

228 Ga 492, HERRING V. HERRING

@ 493 " The questions presented by this appeal require a consideration of the evidence. Since the evidence has not been brought to this court by any of the methods provided in Code Ann. 6-805, no question involving the evidence can be considered by this court.

Webb v. Jones, 221 Ga 754"

GEORGIA LAWS, 1901, p. 156 & 159

"Sec. 13. Be it further enacted, that the judge of said city court shall have power and authority to hear and determine all civil cases over which said court has jurisdiction, and to give judgment and award execution thereon without the intervention of a jury; provided that upon the opening of the court at each term the judge of said court shall proceed to call the appearance docket of the court, and either party in any case upon said docket shall then be entitled to demand and shall at the trial term have a jury to try said case, which demand shall be in writing, and signed by himself or his counsel, and made upon the call of said docket." and @ p. 162, "Sec. 24. Be it further enacted, that in all cases, civil or criminal, pending in said city court, in which a jury is demanded by either party, a jury trial shall be had in the term time, under the provisions of this Act, by a jury of twelve men. All civil cases in which no jury is demanded by either party shall be tried by the court in term time."

STAMPS TIRE COMPANY, INC. V. HARTFORD ACCIDENT & INDEMNITY CO., 115 GA APP 326

2. Having filed this action in Fulton Civil Court and having failed to file a written demand for jury trial in accordance with the terms of Sec. 39 of an Act of 1913 (Ga. L. 1913, pp. 145, 165) as amended by Sec. 4 of an Act of 1935 (Ga. L. 1935, pp. 500, 502), the plaintiff must be held to have waived a trial by jury.

HUDGINS V. PURE OIL COMPANY, 115 GA APP 543

2. This action having been filed in Dekalb Civil Court and defendant having failed to file a written demand for jury trial in accordance with the terms of Section 12 of an Act of 1951, defendant must be held to have waived a jury trial.

GEORGIA RAILROAD & BANKING CO. V. PENDLETON, 87 GA. 751

1. If not in all cases whatsoever, certainly in any case admitting of doubt, the question of rendering a judgment by the superior court without a jury is one not involving jurisdiction, but the proper exercise of jurisdiction, and the improper decision of it is mere error and will not render the judgment void.

PAPE V. WOOLFORD REALTY, 35 GA APP 284

(6) The judge may ordinarily have no authority to render judgment without the verdict of a jury, except in cases referred to in that section. This does not mean that, even in those cases where the verdict of a jury is necessary, the court may not direct it where it is demanded by the law and the facts. Atkinson v. Olmstead, 140 Ga 100

CENTENNIAL EQUITIES CORPORATION V. HOLLIS, 132 GA APP 45

@ 45 "2. Defendant argues that an entry of judgment without a jury is void. But under Section 39 of the law creating that court, a jury trial must be demanded as specifically provided in Ga. L. 1935, pp. 500, 503. Indeed, this court has held that where no jury is demanded it is not error to try the case without a jury. Cherry v. McCutchen, 68 Ga. App. 682; Owen v. Stevenson, 18 Ga. App. 301.

In the absence of any showing of improper service (lack of notice), the failure of defendant to demand a jury trial pursuant to Section 39, supra, is a waiver of right to trial by jury."

8 GEORGIA APPEALS 38, PELHAM MANUFACTURING CO. V. POWELL

The portion of the act creating the city court of Camilla relating to the judge's power to try the case without a jury is in the following language: "The judge of the city Court of Camilla shall have power and authority to hear and determine all civil cases of which said court has jurisdiction, and to give judgment thereon; provided, that any party in any case shall be entitled to a trial by jury upon entering a demand therefor in writing by himself or attorney on or before the call of the docket of the term of said court to which said case is made returnable in all cases where such party is entitled to a jury trial under the constitution and laws of this State."

It was early held in this State, that, as to civil cases, "Modern law reform... seeks, among other objects, to dispense as much as possible with juries;" that trial by jury is a privilege which may be waived; that when a party has had the opportunity to demand it, and has omitted to demand it, he can not complain that it has been denied him; that by an

act of the General Assembly the privilege may be "clogged with onerous conditions" without offending the fundamental law, unless, indeed, the statute be such as "totally prostrates the right or renders it wholly unavailing." Flint River Steamboat Co. v. Foster, 5 Ga. 194 (48 Am. D. 248). The requirement of a demand for jury trial as a condition precedent to the enjoyment of the privilege is no violation of the constitutional right of trial by jury. Sutton v. Gunn, 86 Ga. 652 (12 S.E. 979). If the statute fixes a reasonable time within which the demand must be made, the right is ordinarily lost unless the demand be made within the time prescribed. Sutton v. Gunn, supra; Heard v. Kennedy, 116 Ga. 36 (42 S.E. 509). See also Waterman v. Glisson, 115 Ga. 773 (42 S.E. 95); Miller v. Ga. R. Bank, 120 Ga. 17 (47 S.E. 525). In the case of Heard v. Kennedy, just cited, where the language of the statute was almost literally that before us now, it was held that if the jury trial was not demanded at the return term, it could not be demanded at a subsequent term.

In some of the city-court acts of this

State the language is mandatory that the judge shall try the case, if jury trial is not demanded, and in those courts the judge has not the discretion to order a jury trial over the protest of either party. Green v. State, 6 Ga. App. 324 (64 S.E. 1121), and cases therein cited. But unless the language is mandatory that the judge shall try the case in the absence of a demand for jury trial (and the language of the present act is not mandatory in that respect), the judge has the discretion of referring the facts to a jury. Central R. Co. v. Gleason, 69 Ga. 200, Bibb Land Co. v. Lima Machine Works, 104 Ga. 116 (30 S.E. 676, 31 S.E. 401); Thornton v. Travelers Ins. Co., 116 Ga. 121 (42 S.E. 287, 94 Am. St. R. 99). If the statute sets no time limit within which the demand must be made, it may be made at any time before the case is called for trial, or upon the call for trial; and in such cases a waiver of jury trial may be withdrawn where the case has been tried once and a new trial is to be had, if the notice of a desire for jury trial is timely given. Brown v. State, 89 Ga. 340 (15 S.E. 462). A party who without pro-

test goes to trial before the judge when he should have been tried before the jury, and vice versa, will not be heard to complain or to demand a hearing before the other trior. Logan v. State, 86 Ga. 266 (12 S.E. 406); Taffe v. State, 90 Ga. 459 (16 S. E. 204); Thomas v. State, 7 Ga. App. 637 (67 S.E. 894). The only fair deduction to be drawn from the principles stated and the cases cited above is, that where the statute confers jurisdiction upon the judge to try the trial which, at the time the agreement was made, was about to occur before the particular judge to whom the stipulation referred. Almost the identical point involved in this case was before the Supreme Court of Alabama in the case of Brock v. Louisville & Nashville R. Co., 122 Ala. 172 (26 So. 335). That court held that where the statute required the demand for a jury trial to be made at the first term, it could not be made thereafter.

86 GEORGIA 652, SUTTON V. GUNN

@ 656, Had a jury been demanded, even at the time of trial, which was September 24th, the demand could have been acceded to, but there was no demand made at any time, and for that reason the right to a jury trial was not violated. The court was not called on for a jury trial. Indeed, no defense whatever was filed; there was no issue for a jury to try; nothing was to be established but the truth of the plaintiff's declaration; the case was in default. Even where a mode of affirmative waiver is prescribed, a trial by jury may be waived in civil cases in other ways. "The clause in the constitution that the right to a jury trial in civil cases may be waived in the manner to be prescribed by law, has not been regarded as precluding courts from holding parties to have waived by their conduct or silence the right to a jury trial, upon general principles of law applicable to the subject, although the case is not provided for by any statute." Baird v. Mayor, 74 N.Y. 383. The statute touching the city court of Macon treats all parties to civil cases, whether plaintiffs or

defendants, as waiving the right unless they demand it. No affirmative act by a party to a pending cause is required to set the trying functions of the court in motion, but an affirmative act is required to put a jury in motion. Under such a system every party is presumed to desire his case tried by the court if he fails to sifnify that he wishes a jury. Surely this is imposing a very mild condition. It is a reasonable regulation. Garrison v. Hollins, 2 Lea, 684; Lawrence v. Born, 86 Pa. St. 225; Foster v. Morse, 132 Mass. 354; Cooley Const. Lim. 6 ed. 505. Much more onerous terms might be exacted by statute without infringing upon the constitutional sacredness of trial by jury. Flint River Steamboat Co. v. Foster, 5 Ga. 194.

MARLER V. C & S BANK OF MILLEDGEVILLE,

239 GA 342

"The Citizens & Southern Bank of Milledgeville filed a complaint against Marler seeking repayment a loan as evidenced by a note. Neither party demanded a jury trial in the original pleadings.

...after receiving the calendar, Marler orally requested a jury trial. On April 10, 1975, he amended his answer to make the same request.
...the trial court denied Mr. Marler's request for a jury trial, finding the request was not timely filed and was interposed solely for the purpose of delay.

The case come on for trial. Marler renewed his request for a jury trial which was again denied. The case was tried before a judge without a jury who, at the close of all evidence, entered a judgment in favor of the bank in its suit on the note, and against Marler on his counterclaim.

This court granted a writ of certiorari to determine whether the Civil Practice Act applies to the State Court of Cobb County, and, if applicable,

whether it gives the defendant in this case a right to a jury trial.

In its opinion, the Court of Appeals held that Section 8 of the 1964 Act creating the Civil and Criminal Courts of Cobb County, and not the CPA, controlled in this case. Thus, they concluded that the CPA's rule on waiver of jury trial was properly disregarded by the trial court herein.

The CPA provides that the right of a jury trial by the Constitution of the state or as given by a statute of the Code shall be preserved to the parties inviolate. Code Ann. 81A-138. The CPA allows amendments to pleadings at any time before the entry of a pre-trial order. 81A-115(a). The Cobb County local statute (Ga. L. 1964, p. 3211) requires a demand for jury trial to be made at the time of filing of an answer and not otherwise. Thus, the Cobb County local statute, as written, denies a litigant the right of amendment, as far as requesting a jury trial is concerned, and such a restriction is clearly in conflict with 81A-115(a) of the CPA. The CPA must prevail. Johnson v. Barnes, supra.

Marler filed an amendment to his original answer asking for a jury trial. The amendment was filed before the entry of a pre-trial order. Under the liberal pleading rule of the CPA, the amendment would relate back to the original date of filing. Code Ann. 81A-115."

HALL, Justice, dissenting.

"The majority opinion holds (1) that the 1964 Act relating to the State Court of Cobb County, which requires a written demand for trial by jury, is not on its face in conflict with the Civil Practice Act, and (2) that even though the demand was not made within the time required by the 1964 Act, the CPA, in Code Ann. 81A-115(a), gives a party the right to make the demand at any time before the entry of a pre-trial order. I agree that the demand for trial statute is not in conflict with that section of the CPA embodied in Code Ann. 81A-138 and 81A-139. However, I dissent to the application of Code Ann. 81A-115(a).

The fatal flaw in the majority opinion is its holding that an amendment can re-

vive a right that has been waived. The 1964 Act, like Rule 38 of the Federal Rules of Civil Procedure, provides that where the demand for jury trial is not made within the time specified it is waived. 'Once effectively waived, the right to a jury trial is not revived by a reversal or a new trial. Neither is the right once waived revived by amendment of the pleadings.' 9 Wright & Miller, Federal Practice and Procedure: Civil 2321, p. 104 (1971).

Using the logic of the majority opinion, matters waived under Code Ann. 81A-112 could be revived under Code Ann. 81A-115.

I would affirm the judgment based upon the ruling made by the Court of Appeals."

Ga. Code Ann. 37-219

" The judgment of a court of competent jurisdiction may be set aside by a decree, for fraud, accident, or mistake, or the acts of the adverse party unmixed with the negligence or fault of the petitioner. "

Ga. Code Ann. 110-709

" The judgment of a court having jurisdiction of the person or subject-matter, or void for any other cause, is a mere mullity, and may be so held in any court when it becomes material to the interest of the parties to consider it."

Ga. Code Ann. 81A-182

JURISDICTION AND VENUE UNAFFECTED. This Title shall not be construed to extend or limit the jurisdiction of the courts or the venue of actions therein.

ERWIN V. MARX, 228 GA. 494

@ 496 "1. Under the provisions of Sec. 60 (e) of the CPA (81A-160(e), a complaint in equity may be brought to set aside a judgment for fraud, accident or mistake, or the acts of the adverse party unmixed with the negligence or fault of the complainant."

"2. Under the former Code Sections, it was uniformly held that where a judgment in a pending lawsuit negligently failed to make his defense, equity would not intervene to grant him any relief from a judgment obtained against him in consequence of his negligence. The cases so holding were reviewed extensively and quoted in the exhaustive opinion of this court rendered in the case of Bedinfield v. Old National Bank & Co., 175 GA 172 (2). It would serve no useful purpose to repeat the quotations of the many varied statements of this rule set forth in that opinion.

"3. ...Under the principles enunciated in the cases cited in the preceding headnote, and many more that could be cited, they are barred by reason of their own negligence and laches from invoking the aid of equity in setting aside the judgment against them and the trial court did not err in dismissing their complaint."

109 GEORGIA 597, SUWANEE TURPENTINE CO. V. BAXTER

@ 602, To render a judgment void there must be a want of jurisdiction of the subject-matter or of the person, or an excess of jurisdiction, or the judgment must be fraudulent or fraudulent and collusive. For a want or an excess of jurisdiction the defendant in a judgment may have it set aside, but this can not be done by one who is a stranger to the judgment. A creditor or a stranger, when their interests are affected by the judgment, may have it set aside for fraud or fraud and collusion.

@ 603, A third person not a party to the record can not go into a court and move to set aside a judgment which is not against him.

@ 599, ...and because the court had no jurisdiction to render a judgment on such a petition.

See also Dixon v. Baxter, 106 Georgia 180, valid and regular on its face, parties not in case not charging fraud or collusion, not proper move to set it aside.

148 GEORGIA 159, APPERSON V. MUTUAL FERTILIZER CO.

Every infirmity in the judgment against Apperson and in the judgment against Henderson appears on the face of the record. A motion in arrest of judgment was therefore an available remedy. If the judgments are illegal and void, as alleged in the petition, affidavit of illegality was a proper remedy to resist the enforcement of the execution. ...Equity will not relieve against a judgment if the defendant has an available, adequate, and complete remedy at law.

@ 608, In the second place, although the divorce decree may be void, it does not so appear on its face. That the signature to the acknowledgment of service was a forgery does not so appear, it is a matter which must be proven. Likewise, that the defendant in that action was at the time a patient at the Milledgeville State Hospital, suffering from a mental illness, does not appear from the face of the record; that, too, must be proven. And since the decree does not appear to be void on the face of the record, it is binding upon the parties until set aside by a direct attack in the court where it was obtained. Hood v. Hood, 143 Georgia 616 (85 SE 849); Thomas v. Lamber, 187 Georgia 616 (1 SE2d 443), and citations.

@ 333, 2. "In 15 R.C.L. 893, it is said: 'According to the common-law rule, adhered to at the present time in most of the States, the presumption in favor of the jurisdiction of a court of general jurisdiction is conclusive, and its judgment cannot be collaterally attacked where no want of jurisdiction is apparent of record. Whenever the record of such a court is merely silent upon any particular matter, it will be presumed, notwithstanding such silence, that whatever ought to have been done was not only done but that it was rightly done. So where the judgment contains recitals as to the jurisdictional facts these are deemed to import absolute verity unless contradicted by other portions of the record. Consequently such a judgment can not be collaterally attacked in courts of the same State by showing facts aliunde the record, although such facts might be sufficient to impeach the judgment in a direct proceeding against it. The validity of a judgment when collaterally attacked must be tried by an inspection of the judgment roll alone, and no other or further evidence on the

petitioner." Where a defendant negligently fails to make his defense, equity will not grant any relief. 'Courts of equity grant relief only in favor of the diligent; and this court has uniformly held that equity does not relief from a judgment which could have been prevented but for the negligence of the complaining party ... Negligence of a party precludes the interference of equity against the judgment ... Before a court of equity will interfere with a judgment of a court of common law, it must appear, not only that the complaining party was ignorant of the existence of a defense which he might have made to the common-law suit, but that such ignorance did not result from his own negligence, and that he is without adequate remedy at law. A court of equity is loath to open a judgment in order to enable a complaining party to make a defense which could have been made at law, and will not open such a judgment where the defendant has been negligent. A court of equity will not grant relief from a judgment that could have been prevented by diligence. Where one is

prevented alone by his own negligence from seeking the enforcement of any rights he may have, by properly presenting them to the proper court, equity will not reliev such a one from his own lack of diligence. This doctrine was recognized by this court as far back at least as Robbins v. Mount, 3 Georgia 74... The controlling point in this case has been frequently passed upon by this court, andit has been invariably held that there is no relief from a judgment, even in a court of equity, that could have been prevented but for the negligence of the party."

@ 182, "Let it be assumed from the allegations of the petition, that petitioner would have appeared had it known that there was such a proceeding. But granting this to be true, is the fact that (Pet) was in ignorance of the proceeding --- when even very slight diligence in watchful supervision of its interest would have given the bank knowledge of the citation -- a sufficient reason for setting aside the judgment rendered by the court of ordinary in proceedings conforming to the requirements of the code? We think not."

137 GEORGIA 551, COHEN V. MEADOR

A court of equity will not enjoin the enforcement of an execution issued by a court of competent jurisdiction, where it appears that the parties to the suit have had their day in court and the defendant in execution offered no evidence on the trial of the case, and it does not appear that he was prevented from doing so by fraud or accident, or the act of the other part, unmixed with negligence or fraud on his part. (a) the judgment of the court, in such a case, adjudicated that all the elements necessary to a valid judgment were had at the trial, and that all the issues made between the parties were adjudicated.

...it is too late, after judgment, to ask a court of equity to open the judgment and let in defenses which could have been made before judgment.

@ 553 ... where such a court has the necessary parties before it, and the proper subject-matter within the jurisdiction of the court, a judgment rendered adjudicates the rights of the parties to the suit. Where there is a real party plaintiff, and a real party

defendant, and the plaintiff recovers in the cause of action against the defendant the amount sued for, such a judgment adjudicates that the defendant owed the plaintiff the amount recovered. And such a suit settles the further fact that every element necessary in the suit was presented which enabled the plaintiff to recover; and when that appears, the parties to the suit are concluded by the judgment.

...the amount sued for was awarded by the judgment. Rightly or wrongly, the judgment adjudicates these facts. It does not matter what the real fact is -- the judgment cannot be upset by saying that some element necessary to a recovery is lacking, or is untrue, after the judgment is rendered. The judgment is attacked as void because these elements necessary to a recovery is lacking; but the judgment settled those contentions against the defendant.

...the judgment adjudicates all issues between the parties to the case. The judgment involved in this case finds that the plaintiff was the trustee of the bankrupt, and that the defendant owned the plaintiff as the trustee of the bankrupt.

Whether it was so in point of fact before the judgment, it is too late after the judgment to enjoin it if the defendant did not avail himself, on account of his laches, of whatever defense he might have had at the trial. Anything affecting the plaintiff's right to recover ought to be set up before judgment, and not after it is rendered. There would be no end to litigation if any other rule obtained. No sufficient reason appears why the defendant did not appear and make whatever defense he might have legally or equitably set up at the trial. He was duly served and has had his day in court, and it is too late after judgment to seek the aid of a court of equity in order to make the defense he should have made at the trial. That he did not appear in court and make his defense is due to his own laches.

...No motion was made to open the judgment or set it aside; and after the proper parties have had their day in court, and the subject-matter of the suit is adjudicated by a court of competent jurisdiction, a court of equity will not interfere to enjoin the execution issued upon the judgment from proceeding according to law.

138 GEORGIA APPEALS 237, VENABLE V. PAYNE

The new Civil Practice Act permits very loose and general pleadings as to most actions and defenses, but fraud is one of the exceptions, and must be pleaded in detail, showing just what the fraud consisted of. See Code Ann. 81A-109 (b).

@ 238, The question as to what is a court of record has been decided in only one reported Georgia case. Planters' & Mechanics Bank v. Chipley, supra. This was an opinion by the Superior Court of Muscogee County rendered in 1842. That Court's treatment of the question is rather exhaustive and well-reasoned. In arriving at the conclusion that a justice of peace court is not a court of record, it considered the history of English courts along with pertinent exerpts from such noted English authorities as Blackstone, Coke, and Bracton. This case and others since then make it apparent that no clearly-defined rule of thumb exists for determining whether a court is or is not a court of record. See 20 Am. Jur. 2d 405, Courts, 26. The presence of the following characteristics has been considered as indicative that a particular court is a court of record: (1) the court has power to fine and imprison; (2) the court exercises its functions independently of the person of the magistrate; (3) the court proceeds according to the course of the common law; (4) the court has a seal; (5) the acts and judicial proceedings

are enrolled in parchment for a perpetual memorial and testimony, which rolls are called the record of the court and are of such high and supereminent authority that their truth is not to be called in question (i.e. Blackstone's definition).

It is generally accepted that the one essential feature necessary to constitute a court of record is that a permanent record of the proceedings of the court must be made and kept. A definition of such record generally accepted is that it is a precise history of a suit from its commencement to its termination, including conclusions of law therefrom drawn by the proper officer for the purpose of perpetuating the exact state of facts. State v. Allen, 717 Ohio St. 470 (159 NE 591) and cases cited. See also Page v. Turcott, 179 Tenn. 491 (10) (167 SW2d 350) and Naro v. State, 212 Ala. 5 (101 S. 666) where the Supreme Court of Alabama said of itself: "This is a court of record, wherein the acts and proceedings of the court are enrolled as for a perpetual memorial, and...such courts 'speak only through their records.'"

The Supreme Court of Tennessee in Chrisman v. Metropolitan Life Ins. Co., 178 Tenn. 321, 326 (157 SW2d 831) in holding, "When the minutes of a court of record are signed by a judge they become the highest evidence of what was done in court and, so far as they are records of judicial proceedings, they import absolute verity, and are conclusive unless attacked for fraud."

The General Assembly of Georgia apparently recognized that a court of record must enroll in permanent records its proceedings when it required the Clerk of the Superior Courts "2. to attend all sessions of the court and keep fair and regular minutes of their proceedings from day to day, including a transcript of the judge's entry on his dockets...." Code 24-2714 (Ga. L. 1799, Cobb, 573 as amended) and by Code 24-2715 (Ga. L. 1880-81, p. 93 as amended) "1. To record in well-bound books, within six months after the final determination of any civil suit, all the proceedings relating thereto." and "2. Every clerk of the superior or city courts must record immediately in his book of final records every part of the

pleadings in every case; all garnishments, affidavits, bonds, and writs of attachment; all claim affidavits and bonds, and all bonds given in any judicial proceeding; and no clerk shall allow any of such papers to be taken from his office before recording them as herein required; and such record shall be a part of the final record of the papers required by law to be made, or all such record, as the case may be."

The Clerk of the Supreme Court is required "3. To keep in well-bound books fair and regular minutes of the Court's proceedings, a record of its judicial acts, a docket of its causes, . and such other books as said Court may require him to keep." Code 24-4103 (Ga. L. 1845, Cobb, 451, as amended.)

GEORGIA CODE ANNOTATED, SECTION 81A-155

(a) DEFAULT JUDGMENT. If in any case an answer has not been filed within the time required by this Title, such case shall automatically become in default unless the time for filing the answer has been extended as provided by law. The default may be opened as a matter or right by the filing of such defenses within 15 days of the day of default upon the payment of costs. If the case is still in default after the expiration of such period of 15 days, the plaintiff, at any time thereafter, shall be entitled to verdict and judgment by default, in open court or in chambers, as if every item and paragraph of the petition were supported by proper evidence without the intervention of a jury, unless the action is one ex delicto or involves unliquidated damages, in which event the plaintiff shall be required to introduce evidence and establish the amount of damages before the court without a jury as to actions ex contractu, and before a jury as to actions ex delicto, with the right of the defendant to introduce evidence

as to damages and the right of either to move for a new trial in respect of such damages. An action based upon open account shall not be considered one for unliquidated damages within the meaning of this section.

GA CODE ANN. SECT 81A-156

" (a) A party seeking to recover upon a claim....at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

" (b) A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor for all or any part thereof.

" (c) The motion shall be served at least 30 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. ....."

" (e) Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissable in the evidence, and shall show affirmatively that the affiant is competent to testify

to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith..... All affidavits shall be filed with the court and copies thereof shall be served on the opposing parties. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this section , must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

GEORGIA CODE ANNOTATED, SECTION 81A-160

RELIEF FROM JUDGMENTS.

(a) Collateral attack. A judgment void on its face may be attacked in any court by any person. In all other instances, judgments shall be subject to attack only by a direct proceeding brought for that purpose in one of the methods hereinafter prescribed.

(e) Complaint in equity. Complaint in equity may be brought to set aside a judgment for fraud, accident or mistake, or the acts of the adverse party unmixed with the negligence or fault of the complainant. Where a judgment is subject to be set aside in equity, the court may grant such other and further relief, legal or equitable, as may be necessary to afford complete relief.

(f) Procedure; time of relief

Reasonable notice shall be afforded the parties on all motions. Relief in equity must proceed by complaint and summons. A judgment void because of lack of jurisdiction of the person or subject-matter may be attacked at any time. Motions for new trial must be brought within the time now or hereafter prescribed by law. In all other instances, all motions, complaints or other proceedings to set aside or attack

judgments shall be brought within three years from entry of the judgment complained of."

GA. CODE ANN. 81A-104 (e) (2)

Personal service outside the State upon a natural person may be made (i) in any action where the person served is a resident of this State, and (ii) in any action affecting specific real property or status, or in any other proceeding in rem without regard to to the residence of the person served. When such facts shall appear, either by affidavit or by a verified complaint on file, that a claim is asserted against the person in respect to whom the service is to be made, and that he is a necessary or proper party to the action, such court may grant an order that the service be made by personal service outside the State. Such service shall be made by delivering a copy of the process together with a copy of complaint in person to the persons served.